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MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1175

PAULA BETH LASHLEY MAHER, Administratrix of the Succession of Morris G. Maher

Petitioner

versus

THE CITY OF NEW ORLEANS, ET AL

Respondents

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MAY IT PLEASE THE COURT:

Paula Beth Lashley Maher petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals (Appendix A, pages 1A-32A infra) is reported at 516 F.2d 1051 (5thCir.1975). The opinion of the District Court (Appendix D, pages 35A-57A infra) is reported at 371 F. Supp. 653 (E.D. La. 1974). Other opinions which are relevant to this Court's consideration because they form part of the background of this controversy are:

*Maher v. City of New Orleans*, 222 So.2d 608 (La.App.4thCir.1969), and;
*Maher v. City of New Orleans*, 256 La. 131, 235 So.2d 402 (1970).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on July 31, 1975 (Appendix B, page 33A, infra). On September 26, 1975, the Court of Appeals denied Mrs. Maher's timely petition for rehearing en banc (Appendix C, page 34A, infra). On December 2, 1975, Mr. Justice Powell extended the time for filing a writ of certiorari to and including February 23, 1976.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that the subject Ordinance, as applied to Maher, was a permissible exercise of police power as opposed to an unconstitutional taking of Maher's property in violation of the United States Constitution.

2. Whether the Court of Appeals erred in holding that the Ordinance complied with the due process clause of the United States Constitution in spite of its admitted failure to provide any guidelines to aid those charged with its administration in determining which buildings are worthy of preservation.

## ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a review of the provisions of Chapter 65 of the Code of the City of New Orleans (Appendix F,

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pages 60A-77A, infra) to determine whether this Ordinance violates Amendments V and XIV to the United States Constitution which state in pertinent part:

Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

In 1963, Maher[1] sought a permit to demolish a building he owns in the Vieux Carre section of New Orleans. Pursuant to the applicable provisions of the Vieux Carre Ordinance (Appendix F, pages 60A-77A, infra; herein referred to as the Ordinance), Maher applied to the Vieux Carre Commission (hereinafter referred to as the Commission) for permission to demolish the building, which permission was granted.

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[1] The proceedings in the District Court were initiated by Morris G. Maher. During the pendency of the proceedings before that Court Mr. Maher died. His wife, Paula Beth Lashley Maher, was substituted as plaintiff in her capacity as the administratrix of Mr. Maher's succession. Petitioner will be referred to herein as Maher.

Certain interested citizens' groups convened a hearing before the City Council of New Orleans (hereinafter referred to as the Council). The Council found that the Maher building "had sufficient architectural and historical value to warrant its preservation" (R144),[2] denied the demolition permit and Maher has ever since been forced to maintain the structure at his expense including the payment of property taxes.

The decision of the Council was held procedurally proper under the Ordinance by the Louisiana courts[3] and Maher filed suit in the United States District Court for the Eastern District of Louisiana seeking injunctive relief and a declaratory judgment on the grounds that the Ordinance effected a taking of his property without just compensation in contravention of the Fifth and Fourteenth Amendments to the United States Constitution; that the Ordinance violated the due process clause of the Fourteenth Amendment to the United States Constitution because it failed to set forth standards to guide the Commission or the City Council in determining which buildings were worthy of preservation and that the Ordinance failed to require that the Commission or Council consider the eco-

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[2] This and all "R" references are to the joint appendix filed in the Circuit Court which document consisting of one volume is being certified and transmitted to this Court as the record in accordance with Supreme Court Rule 21(2).

[3] The Ordinance did not clearly indicate whether an appeal could be taken from the Commission to the City Council in an instance where the Commission granted a demolition permit as opposed to denying one. This issue was first tried before the Civil District Court for the Parish of Orleans (unreported), an appeal from a decision favorable to Maher was taken to the Louisiana Fourth Circuit Court of Appeal, *Maher v. City of New Orleans*, 222 So.2d 608 (La.App.4th Cir. 1969). The Court of Appeal reversed the District Court and Maher applied for writs to the Louisiana Supreme Court which were granted. The Louisiana Supreme Court held that the Ordinance permitted an appeal under such circumstances. *Maher v. City of New Orleans*, 256 La. 131, 235 So.2d 402 (1970). When Maher filed suit in the Federal District Court below, the defendants raised the issue of res judicata which was resolved in Maher's favor in both the District and Circuit Courts. See Appendices A and D, infra.

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nomic impact of a preservation mandate on the owner of property designated for preservation.

In the District Court, Maher argued that the absence of standards was particularly onerous because the Ordinance provided criminal sanctions[4] of both fines and imprisonment for failure to comply with a preservation mandate and that the record of administration of the Ordinance clearly reflected that the absence of standards had led to its inconsistent, discriminatory and arbitrary administration.

Maher further contended that the Ordinance was not drafted or administered in accord with the substance and intent of the Louisiana Constitutional Enabling Act, Section 22A of Article XIV of the Constitution of the State of Louisiana (Appendix G, pages 78A-80A, infra) which patently contemplated compensating the owner of a building designated for preservation:

> "Buildings; tax exemption; preservation. The Commission Council of the City of New Orleans is authorized to exempt such buildings and other structures, as may be designated by the said Vieux Carre Commission as having historical and architectural value, from municipal and pa-

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[4] Section 65-37, Code of the City of New Orleans (Appendix F, pages 60A-77A infra) provides with regard to violations of the Vieux Carre ordinances:

> "Failure of the owner, or the other proper person having legal custody of the structure or building to correct the defects as outlined in Section 65-36 after knowledge of the existence of such defects has been brought to their attention, shall constitute a violation of this Article and shall be punishable as provided in Section 1-6. (MCS, Ordinance No. 1354, Subsection 1, 5-15-58)."

Section 1-6 of the same Code provides in pertinent part:

> ". . . the violation of any such provision of this code or any such ordinance shall be punished by a fine not exceeding $100 or by imprisonment for not more than 90 days or both. . ."

Under this Section, each day that a violation continues is considered a separate offense.

rochial taxation for such period of years as said Commission Council may determine; provided, that the owners of the said buildings and structures, for themselves, their heirs and assigns, shall agree by formal contract, with the said Commission and the City of New Orleans, that the said buildings or other structures shall never be altered or demolished without the approval of the Vieux Carre Commission.

"Buildings; acquisition. The preservation of the buildings in the Vieux Carre section of New Orleans having architectural and historical value is hereby declared to be a public purpose and the City of New Orleans is hereby authorized to acquire by purchase or expropriation or otherwise, such buildings and other structures in that section of the City of New Orleans, as the said Vieux Carre Commission may recommend to the Commission Council."

In fact, the only sections of the Ordinance which deal with the denial of demolition permits and the preservation of structures (as opposed to the regulations of signs, lighting, awnings, etc.) state:[5]

"Section 65-6. Purpose; definition of Vieux Carre Section.

"The Vieux Carre shall have for its purpose the preservation of such buildings in the Vieux Carre section of the city as, in the opinion of the Commission, shall have architectural and his-

[5] The full text of the Ordinance is set forth in Appendix F. The Sections quoted here are the only parts of the Ordinance which purport to define "architectural and historical value" and which set up procedures for designation of a building having, in the opinion of the Commission or the Council, architectural and/or historical value. These sections in addition contain the affirmative maintenance provisions of the Ordinance.

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torical value and which should be preserved for the benefit of the people of the city and state.

"The Vieux Carre Section of the city is hereby defined to comprise all that area within the city limits within the following boundaries: The River, Up-town side of Esplanade Avenue, the River side of Rampart Street and the lower side of Iberville Street. (C.C.S., Ord. No. 14,538, §2.)

"Section 65-8. Submission of plans for exterior changes to Commission.

"Before the commencement of any work in the erection of any new building or in the alteration or addition to, or painting or repainting or demolishing of any existing building, any portion of which is to front on any public street or alley in the Vieux Carre Section, application by the owner for a permit therefor shall be made to the Vieux Carre Commission, accompanied by the full plans and specifications thereof so far as they relate to the proposed appearance, color, texture of materials and architectural design of the exterior, including the front, sides, rear and roof of such building, alteration or addition or of any out building, party wall, courtyard, fence or other dependency thereof. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085, §1.)

"Section 65-9. Commission recommendations and action thereon.

"The Vieux Carre Commission shall upon due consideration report thereon promptly its recommendations, including such changes, if any, as in its judgment are reasonably necessary to comply with the requirements of this chapter, by sending them, in writing, to the Director of the Department of Safety and Permits with the application and documents referred to in this article and, if they are found by the Director to comply reason-

ably with the requirements of this article and if such application and intended work shall conform also to all other regulations, ordinances and laws of the city, the Director shall issue promptly a permit for such work and indicate on such permit the extent and nature of the work to be performed thereunder. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085, §1.)

"Section 65-10. When Director to submit question to Council; action of Council.

"If the applicant for a permit shall refuse to accede to reasonable changes recommended by the Vieux Carre Commission, if the Commission shall disapprove any application or if the Director of the Department of Safety and Permits finds that the recommendations of the Commission do not comply reasonably with the requirements of this article, the Director shall within not later than five days, forward such matters with his written comments to the Council for such action as in its judgment, after notice and affording an opportunity to the applicant and to the Commission and other protesting parties to be heard, shall effect reasonable compliance with such recommendations and this article. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085,§1.)

"ARTICLE III. PRESERVATION OF EXISTING STRUCTURES AND BUILDINGS.

"Section 65-36. Preservation of existing structures by owner or person having legal custody thereof.

"All buildings and structures in that section of the city known as the Vieux Carre Section and so defined generally in section 65-6, section 65-7, under the jurisdiction of the Vieux Carre Com-

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mission, as provided by Article 14 of Section 22A of the Louisiana Constitution, shall be preserved against decay and deterioration and free from certain structural defects in the following manner, by the owner thereof or such other person or persons who may have the legal custody and control thereof. The owner or other person having legal custody and control thereof shall repair such building if it is found to have any of the following defects:

(a) Those which have parts thereof which are so attached that they may fall and injure members of the public or property.

(b) Deteriorated or inadequate foundation.

(c) Defective or deteriorated flooring or floor supports or flooring or floor supports of insufficient size to carry imposed loads with safety.

(d) Members of walls, partitions or other vertical supports that split, lean, list or buckle due to defective material or deterioration.

(e) Members of walls, partitions or other vertical supports that are of insufficient size to carry imposed loads with safety.

(f) Members of ceilings, roofs, ceiling and roof supports or other horizontal members which sag, split or buckle due to defective material or deterioration.

(g) Members of ceilings, roofs, ceiling and roof supports or other horizontal members that are of insufficient size to carry imposed loads with safety.

(h) Fireplaces or chimneys which list, bulge or settle due to defective material or deterioration.

(i) Fireplaces or chimneys which are of insufficient size or strength to carry imposed loads with safety.

(j) Deteriorated, crumbling or loose plaster.

(k) Deteriorated or ineffective waterproofing of exterior walls, roofs, foundations or floors, including broken windows or doors.

(l) Defective or lack of weather protection for exterior wall coverings, including lack of paint, or weathering due to lack of paint or other protective covering.

(m) Any fault or defect in the building which renders the same structurally unsafe or not properly watertight. (M.C.S., Ord. No. 1354, §1, 5-15-58.)

"Section 65-37. Failure to correct defects after knowledge thereof.

"Failure of the owner, or the other proper person having legal custody of the structure or building to correct the defects as outlined in section 65-36 after knowledge of the existence of such defects has been brought to their attention, shall constitute a violation of this article and shall be punishable as provided in section 1-6. (M.C.S., Ord. No. 1354, §1, 5-15-58.)"

On the taking issue, Maher proved by stipulation (R 277) that the denial of his application for a demolition permit had cost him $15,300.00 per year in rental income since 1964. The City, in its answer, admitted (R30):

"However the City of New Orleans has taken appropriate steps in the past to implement the

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> authority granted to it in Article XIV, Section 22A of the Constitution but was unable to do so because of financial difficulties."

Further, the City stipulated in the pretrial order that there were no official guidelines for the Commission or the Council to follow in applying the Ordinance (R34):

> "There are no objective standards promulgated by the City of New Orleans or any of its agencies to guide either the Vieux Carre Commission or the City Council of New Orleans in determining which buildings in the Vieux Carre section of the City of New Orleans have and which buildings in the Vieux Carre section of the City of New Orleans do not have architectural and/or historical value sufficient to warrant their preservation."

The City also stipulated (R 291-2) that it had commenced criminal proceedings against Maher for failure to comply with Section 36(L) of the Ordinance (Appendix F, page 75-A, infra). This resulted from the fact that the building, in the opinion of the Commission, needed painting. The criminal prosecution is being held in abeyance pending the outcome of this case.

On the issue of arbitrary enforcement of the Ordinance, Maher introduced in evidence minutes of Commission hearings and resolutions of the Commission in cases where the Commission permitted the demolition of structures which, *in its opinion*,[6] had admitted architectural and/or historical value (R152-3). On the same issue, Maher

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[6] The Commission's own records reflect that when its members "like a project" they can, because of the absence of standards in the Ordinance, and they have, permitted the demolition of buildings which in the Commission's opinion had architectural value. The following quotes from minutes of resolutions of the Commission concern the building of a hotel in the 300 block of Bourbon Street in the Vieux

introduced in evidence a Federal study[7] (R 275) which concluded:

> "The Commission's policy governing the issuance of demolition permits does not set any standard for determining what buildings have historic or architectural value. The policy is applied with varying degrees of consistency.
>
> "There is a lack of consensus between the Commission and preservation groups, and between members of the Commission themselves as to whether or not particular buildings should be preserved.
>
> "The record indicates that outside pressures have been a factor in the issuance of permits by the Vieux Carre Commission. There have been instances also where the City Council upon appeal proceedings has responded to similar pressures.
>
> "There is a general lack of uniformity or con-

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Carre, and the demolition of buildings to make way for the hotel. In its meeting on February 27, 1962, the Commission stated in a resolution:

> "Whereas this proposed demolition involves several buildings which are in keeping with the architecture of the French Quarter and the remaining property comprise buildings which the Vieux Carre Commission thinks are highly detrimental to the French Quarter",

and a resolution follows granting the demolition permits.

Concerning the same project the Commission in its minutes of a meeting on July 30, 1963, discloses why it was willing to permit buildings in keeping with the architecture of the French Quarter to be demolished:

> "At the executive session, the Commission unanimously adopted the motion that: 'The Commission is wholeheartedly in sympathy with this project and desirous of being helpful to the full extent of their authority. This body hereby approves the project to the limit of their authority except that we cannot legally approve a height beyond 50 feet.'"

[7] The study entitled "Plan and Program for the Preservation of the Vieux Carre, Historical District Demonstration Study" conducted by Bureau of Governmental Research, New Orleans, Louisiana for the City of New Orleans, December, 1968, was introduced in evidence in the District Court and a portion of it is included in the record.

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> sistency in the Vieux Carre's over-all administration of its affairs."

The District Court denied the relief sought by Maher. The Court of Appeals, while pausing to note that, ". . .the past enforcement of the Ordinance does not seem to have been uniformly predictable. . ." and commenting that:

> "The Court's attention has been directed to ordinances of other municipalities where the authority to prohibit destruction of designated buildings is more limited. Refusals to allow razing may be accompanied by tax credit arrangements, by permission to transfer 'building rights' to other owners or by other economic incentives or palliatives; ordinances may prohibit demolition conditionally or temporarily. *Such measures may be considered wiser or fairer* by a legislature which contemplates an historic preservation enactment." (page 28A, infra) (Emphasis added)

affirmed the District Court's judgment.

## REASONS FOR GRANTING THE WRIT

### POINT I.

The Court of Appeals held that, once the City ordered Maher to preserve his building, Maher must prove:

> ". . . that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return or that other potential use of the property was foreclosed. . ." (page 29A, infra)

in order to classify the City's action as a "taking" rather than a permissible exercise of police power. In so doing,

the Court of Appeals relied on *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), but admitted that *Goldblatt* never reached the issue of affirmative duty. The Court of Appeals purported to find support for the duty to maintain a building by analogy:

> "In the interest of safety, it would seem that an ordinance might reasonably require buildings to have fire sprinklers or to provide emergency facilities for exits and light. In pursuit of health, provisions for plumbing or sewage disposal might be demanded. Compliance could well require owners to spend money." (pages 30A and 31A, infra)

There is a flaw in this analogy because, in each instance cited, the owner has an alternative: he can decide not to build or to demolish if the maintenance burden is, in his opinion, excessive.

The Court of Appeals was very impressed with the goal of preservation. It stated in support of its decision on the taking issue:

> ". . . if the purpose be legitimate and the means reasonably consistent with the objective, the Ordinance can withstand a frontal attack of invalidity." (page 31A, infra)

If this were true, there never would be any necessity for compensation to a property owner. For example: Adequate transportation facilities are a legitimate purpose and the construction of highways is certainly a means reasonably consistent with that end; but, the land which a highway traverses must be paid for.

The Court of Appeals' decision on the taking issue is inconsistent with the following decisions of this Court:

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In *U.S. v. Dickinson*, 331 U.S. 745, 748(1947) this Court stated:

> "Property is taken in a constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

It is difficult to argue that forced maintenance of a building is not equivalent to the imposition of a servitude.

In *Block v. Hirsh*, 256 U.S. 135(1921) this Court approved a rent control law for the District of Columbia, *but only because machinery was provided to insure landlords a reasonable rent.* In Maher's case, there is no machinery which even requires consideration of the economic impact of forced maintenance of the structure.

This case fits within the ambit of the risk described by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416(1922):

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . ."

and at page 415:

> "The general rule at least is while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."

Virtually every commentator who has considered this issue has concluded that the end of preservation can not and should not be achieved by placing the full burden of

the cost on the property owner.[8] One State court put the matter quite succinctly:[9]

> "It is laudable to attempt to preserve a landmark; however, it becomes unconscionable when an unwilling private party is required to bear the expense."

## POINT II.

Maher argued to the Court of Appeals that the Ordinance was "void for vagueness" in that it contained no objective guidelines for determining which buildings were worthy of preservation because of their architectural and/or historical value. The City admitted that no guidelines existed and the Ordinance contains none. The Court of Appeals responded by going far beyond the face of the Ordinance to find that sufficient "standards" were present to pass constitutional muster. Specifically, the Court of Appeals referred to the Schleider survey which was not in existence at the time Maher's case was considered by the Commission or the Council and concluded that while the survey did not bind the Commission "The existence of the survey and other historical source material assists in mooring the Commission's direction firmly to the legislative purpose." (page 23A, infra)

The Court of Appeals found that "In this case, the meaning of a mandate to preserve the character of the

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[8] See A. Dunham, A Legal and Economic Basis For City Planning, 58 Colum. L. Rev., 650, 1958; Costonis, The Chicago Plan: Incentive Zoning and The Preservation Of Urban Landmarks, 35 Harv. L. Rev. 574 (1972); J. Sax, Takings and the Police Power, 74 Y.L.J. 36 (1964) and Mr. Costonis' recent book, Space Adrift, Landmark Preservation and the Market Place (1974).

[9] *State ex rel. Marbro Corp. v. Ramsey*, 28 Ill.App.2d 252, 256, 171 N.E.2d 246, 247 (1960). And to the same effect see *Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S. 2d 185, 224 N.E.2d 700, aff'd, 19 N.Y.2d 598, 278 N.Y.S. 2d 243, 224 N.E.2d 744 (Ct.App.1967).

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Vieux Carre 'takes clear meaning from the observable character of the district to which it applies.'" (page 22A, infra)

The Court of Appeals further noted that the Commission was composed of scholarly gentlemen who should be knowledgeable in this field[10] and added that the Commission's rulings were subject to review by the Council. It should be remembered that the Council is not composed of men, who are, by training, knowledgeable in the field of architectural history and in the Maher case, the Council overruled the Commission's decision that the building had no architectural or historical value.

The Court of Appeals founded its ruling on this issue primarily on *Berman v. Parker*, 348 U.S. 26 (1954). We believe *Berman* is inapplicable to this case. In *Berman* a whole district was designated for condemnation and reclamation. Every building in the district was acquired by the government. In Maher's case the Commission is empowered to designate selective buildings for preservation without guidelines and without compensation. Maher does not challenge the City's right to acquire the whole French Quarter by condemnation. If that was done, then *Berman* would be applicable because as this Court noted in *Berman*, the rights of the property owners there were satisfied "when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (*Berman v. Parker*, supra, 348 U.S. 26, page 36)

The words, "architectural and historical value" are not sufficient standards, *Smith v. Goguen*, 415 U.S. 566 (1974). While *Smith* and other "void for vagueness" cases

[10] As a matter of fact and as the Federal Demonstration Survey noted, only three of the nine members of the Commission are required to have special qualifications (R 274).

generally concern criminal matters, this Court has often held that the doctrine applies to civil matters as well, *Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In addition it must be remembered that Maher is subject to fines and imprisonment for failing to maintain his unwanted building.

The Court of Appeals' journey beyond the face of the Ordinance to find "standards" is in conflict with prior decisions of this Court and decisions of other circuit courts which hold that an ordinance must, on its face, withstand a "void for vagueness" attack, *U.S. v. Harriss*, 347 U.S. 612 (1954); *Grayned v. City of Rockford*, supra; and *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. App. 1968).

This Ordinance has no standards. It simply empowers the Commission to force private property owners to maintain any building in the Vieux Carre which *in the opinion* of the Commission or the Council has "architectural or historical value".

This Court stated in *Grayned v. City of Rockford*, supra, 408 U.S. 104 at page 108:

> ". . . If arbitrary and discriminatory enforcement is to be prevented laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

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As noted in the Federal study referred to, supra, page 17, the absence of standards in the Ordinance has resulted in its arbitrary and discriminatory application; the very danger which the "void for vagueness" doctrine is designed to overcome.

## CONCLUSION

The preservation of our heritage, including buildings, is a valid and worthy cause. However, the Court below has approved in this case an Ordinance empowering a Commission to act without the benefit of standards in designating private buildings for preservation; an Ordinance which imposes on private property owners the entire burden of maintaining such buildings under threat of criminal penalty; an Ordinance which contains no provision requiring consideration of the economic effect on a property owner of the burden of maintenance. The only avenue of relief left open to a property owner under such circumstances is to challenge a preservation mandate in court. The Court of Appeals held that a successful challenge must prove that a sale of the property (presumably subject to the administrative fiat denying demolition and forcing maintenance) is impracticable; that commercial rental of the property could not provide a reasonable rate of return and that other potential uses of the property are foreclosed.

These "standards" suggested by the Court of Appeals are not only vague; they insure the involvement of the judiciary in a case by case *ad hoc* resolution of issues which are legislative in character: issues which could and should be resolved by a legislative body acting pursuant to properly drafted ordinances.[11]

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[11] See, for instance Building and Zoning Code of Portland, Oregon, Chapter 33.120, Historical Buildings and Sites; Code of the City of Alexandria, Virginia, Article 14; and, Administrative Code of the City of New York, Section 207.1.9.

The issues in this case are of *national* significance. The public has demonstrated a desire for preservation and the constitutional methods of achieving this end must be delineated. The burden imposed on property owners by the method sanctioned in the decision of the Court of Appeals is onerous and inequitable. The goal of preservation is for the benefit of all citizens; its cost can not constitutionally be placed on individual private property owners without their consent.

We ask that the writ be granted.

Respectfully submitted,

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Of Counsel:

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## CERTIFICATE

It is certified in accordance with Supreme Court Rules 21 and 33, that three copies of the foregoing petition for certiorari have been served on each of the individuals named below, by depositing same in a United States mail box, first class postage prepaid, or, if applicable, air mail postage prepaid, addressed as follows:

James G. Derbes
315 Richards Building
New Orleans, Louisiana 70112

Caryl H. Vesy
414 Carondelet Building
New Orleans, Louisiana 70130

Blake Arata
City Hall
New Orleans, Louisiana

John W. Ormond
2207 Royal Street
New Orleans, Louisiana 70117

New Orleans, Louisiana, February , 1976.

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Harold B. Carter, Jr.

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**APPENDIX A**

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 74-2022

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PAULA-BETH LASHLEY MAHER, ETC.,
Plaintiff-Appellant

versus

THE CITY OF NEW ORLEANS, ET AL.,
Defendants-Appellees

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Appeal from the United States District Court
for the Eastern District of Louisiana

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JULY 31, 1975

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Before GEWIN, DYER and ADAMS,* Circuit Judges.
ADAMS, Circuit Judge:

The issues posed in the case at hand, although they concern a municipal ordinance, nevertheless carry implications of nationwide import.

Plaintiff Maher, on the basis of the Fifth Amendment, assails an ordinance of the City of New Orleans that regu-

* Of the Third Circuit, sitting by designation.

lates the preservation and maintenance of buildings in the historic Vieux Carre section of that city,[1] popularly known as the French Quarter. Maher asserts that, on its face, the Vieux Carre Ordinance affronts the due process clause, because it provides no objective criteria to guide the Commission charged with its administration. Maher also contends that the Ordinance, as applied and under the guise of regulation, constitutes a taking of his property without just compensation.[2]

After dealing with prefatory issues of res judicata and collateral estoppel, the district court reached the merits and concluded that the Ordinance was valid.[3] We affirm.

*I. Factual Background.*

By amendment to the Louisiana Constitution in 1936, authority was vested in the City of New Orleans to create a Commission whose purpose was stated to be:

> The preservation of such buildings in the Vieux Carre section of the City of New Orleans as, in the opinion of said Commission, shall be deemed to have architectural and historical value, and which buildings should be preserved for the benefit of the people of the City of New Orleans and the State of Louisiana, and to that end the Commission shall be given such

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[1] New Orleans, La., Code ch. 65 (Ordinance No. 14,538) (Vieux Carre Ordinance).

[2] This appears to be the first reported case in a federal court of appeals determining the constitutionality of such an enactment. *But see* Whitty v. City of New Orleans, Civ. No. 6367 (E.D.La., filed June 30, 1959) appeal dismissed, No. 18,059, 5th Cir., filed March 29, 1960 (denial of demolition permit in Vieux Carre does not offend constitution). *See also* City of New Orleans v. Dukes, 501 F.2d 706 (5th Cir. 1974), cert. granted 421 U.S. 908, 95 S.Ct. 1556, 43 L.Ed.2d 773 (1975) (constitutionality of pushcart vendor regulation in Vieux Carre).

[3] 371 F.Supp. 653 (E.D.La.1974).

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> powers and duties as the . . . City of New Orleans shall deem fit and necessary.[4]

To implement the historical preservation plan, the City enacted the Vieux Carre Ordinance. That Ordinance establishes the Vieux Carre Commission and creates a framework of rules governing its powers, duties and operations. Among its other provisions, the Ordinance stipulates that, to perform construction, alteration or demolition work within the geographic boundaries controlled by the legislation, one must procure a permit approved by the Commission.[5]

The present controversy centers on the fate of the Victorian Cottage situated at 818-22 Dumaine Street, adjacent to the Maher residence in the Vieux Carre. Mr. Maher, who owned the property until his recent death,[6] had sought since 1963 to demolish the cottage and to erect a seven-apartment complex on the site.

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[4] La.Const. Art. XIV, Sec. 22A. The same section further charges the Commission with assuring "that the quaint and distinctive character of the Vieux Carre section of the City of New Orleans may not be injuriously affected, . . . that the value to the community of those buildings having architectural and historical worth may not be impaired, and . . that a reasonable degree of control may be exercised over the architecture of [buildings in] said Vieux Carre section . . . ."

[5] Vieux Carre Ordinance §65-8. *Submission of plans for exterior changes to Commission.*

> Before the commencement of any work in the erection of any new building or in the alteration or addition to, or painting or repainting or demolishing of any existing building, any portion of which is to front on any public street or alley in the Vieux Carre Section, application by the owner for a permit therefor shall be made to the Vieux Carre Commission, accompanied by the full plans and specifications thereof so far as they relate to the proposed appearance, color, texture of materials and architectural design of the exterior, including the front, sides, rear and roof of such building, alteration or addition or of any out building, party wall, courtyard, fence or other dependency thereof.

Additional procedures are set forth at §§65-9, -10.

[6] Morris Maher, original plaintiff in this dispute, died in 1973. Thereafter, his wife was substituted as plaintiff in the district court, in her capacity as administratrix of his estate. For convenience we refer to the plaintiff as Maher.

Following a preliminary approval of Maher's proposal by its Architectural Committee, the Commission on April 16, 1963, disapproved Maher's application to raze the cottage. Almost from the time of the original application, interested individual neighborhood owners, as well as organized groups—including the Vieux Carre Property Owners and Associates, Inc., the French Quarter Residents Association and the Louisiana Council for the Vieux Carre —vigorously opposed the Maher plan to tear down the cottage and to develop the property.[7]

Maher undertook a succession of attempts to secure approval of his plans from the Commission.[8] After several refusals, the Commission was finally prevailed upon to issue the permit. Ultimately, however, construction was prohibited when on August 16, 1966, the City Council for New Orleans, on the basis of an appeal, forbade the grant of a demolition permit.

While the proceedings before the Commission and City Council were pending, Maher instituted suit in the Civil District Court for Orleans Parish, Louisiana. Upon the City Council's final refusal to issue a demolition permit, the litigation in the state court was passed. The relief requested was a declaration that the City Council's action was beyond its statutory authority and, hence, null and void. On February 26, 1968, the Civil District Court granted judgment for Maher.

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[7] As intervenors, the Vieux Carre Property Owners and Associates, Inc. and the French Quarter Residents Association have filed a brief in this Court jointly with the City of New Orleans. Also participating in the brief as intervenors are the Crescent Council of Civic Associations and Louisiana Landmarks Society.

[8] The route that Maher pursued through the Commission and City Council is elaborated by the district court in its opinion. 371 F.Supp. 653 (E.D.La. 1974).

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The Louisiana Court of Appeal reversed, holding that the City Council's review was proper and, further, that the Ordinance was constitutional—both on its face and as applied to the Maher application.[9] On appeal, the Louisiana Supreme Court affirmed the judgment of the Court of Appeals that the City Council's action lay within its authority, but held that the constitutionality of the Ordinance had not been pleaded in the trial court and consequently could not be considered on appeal.[10]

Subsequently, in 1971, Maher filed the present federal suit under the civil rights act against the City and its agencies, seeking a declaratory judgment that the Ordinance is unconstitutional and an injunction against its enforcement.[11]

The district court held that res judicata and collateral estoppel were not barriers to the litigation, and proceeded to hold the Ordinance constitutional. This appeal followed.

*II. Collateral Estoppel and Res Judicata Do Not Foreclose the Suit.*

The initial issue before us is whether, because of the prior state court action, the present suit is barred by

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[9] Maher v. City of New Orleans, 222 So.2d 608 (La.App.1969).

[10] Maher v. City of New Orleans, 256 La. 131, 235 So.2d 402 (1970). Nonetheless, the State Supreme Court observed in dictum that in light of earlier cases where it had held the Vieux Carre Ordinance constitutional, it was "inclined to agree" with the Court of Appeal that the Ordinance on its face was not vulnerable to charges of vagueness or indefiniteness. 235 So.2d at 405, n. 3, citing City of New Orleans v. Levy, 223 La. 14, 69 So.2d 798 (1953); City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 (1941); City of New Orleans v. Impastato, 198 La. 206, 3 So.2d 559 (1941).

[11] Jurisdiction is asserted pursuant to 28 U.S.C. §§1331(a), 1343(3) and (4). Maher claims that the Ordinance and its enforcement deprive him of rights under 42 U.S.C. §1983.

principles of res judicata or collateral estoppel.[12] Serving the interest of finality and judicial economy, these doctrines eliminate needless relitigation. Where applicable, res judicata prohibits readjudication of all matters that were, or might have been, litigated respecting the same cause of action between two parties.[13] By comparison, collateral estoppel would preclude renewed controversy over an issue decided in an earlier case even when, in a subsequent case, a different cause of action is presented.[14]

[1, 2] Subsumed in the determination whether principles of finalty govern our disposition of the present case is the underlying inquiry whether the issue is one of state or federal law. Different tests are relevant depending whether the choice of law issue is resolved in favor of federal or state rules. However, in the circumstances here, the outcome is unaffected, since we are persuaded that the suit is not barred under either Louisiana or federal finality rules. Louisiana state law, stemming from the French Code Civile, takes a more narrow perspective on doctrines of repose than do jurisdictions whose rules derive from the common law.[15] Res judicata in Louisiana is

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12 Maher asserts that the City may not seek a result predicated on finality because the City has not filed a cross-appeal. However, the traditional rule is that an appellee need not cross-appeal in order to "urge in support of a decree any matter appearing in the record . . ." Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937), quoting United States v. American Railway Express Co., 265 U.S. 425, 44 S.Ct. 560, 68 L.Ed. 1087 (1924); SEC v. Fifth Ave. Coach Lines, Inc., 435 F.2d 510 (2d Cir. 1970). *See* Stern, When to Cross-Appeal or Cross-Petition—Certainty or Confusion?, 87 Harv.L.Rev. 763 (1974).

13 Chicot Co. Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938).

14 Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); Cromwell v. County of Sac, 94 U.S. (1 Wall) 351, 24 L.Ed. 195 (1877). *See* 1B J. Moore, Federal Practice ¶¶0.401, 0.410, 0.441.

15 371 F.Supp. 653 (E.D.La.1974) and cases cited therein. O'Quin, Res Judicata—"Matters Which Might Have Been Pleaded." 2 La.L.Rev. 347 (1940).

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*stricti juris*,[16] forbidding relitigation only on the ultimate judgment rendered, but not extending broadly to matters that "might have been litigated" and not comprehending intermediate facts. Under the Louisiana view, less weight is attached to finality than in common law jurisdictions, and all doubts are resolved in favor of relitigation.[17]

The district court and the parties have proceeded on the assumption that the applicable law regarding finality is that of Louisiana. We have reviewed the cases relied upon by the district court and by the parties in their briefs and, if Louisiana law controls, the conclusion of the district court that this suit may be maintained does not appear to be erroneous.[18]

[3, 4] Where federal jurisdiction is bottomed on state law, as in a diversity matter, state law principles of collateral estoppel govern, under the rationale of Erie Railway Co. v. Tompkins.[19] Unlike a diversity case, however, the suit here presents a federal constitutional question to the federal courts for resolution according to principles of federal law. Despite the fact that questions of state law and issues of local importance undeniably play a core role, this case would seem more aptly characterized as a federal matter. In such event, federal notions of repose must provide the guideposts for analysis.[20]

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[16] International Paper Co. v. Maddox, 203 F.2d 88 (5th Cir. 1953), cited in Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969). *See* O'Quin, supra note 15.

[17] *Wright Root Beer*, supra note 16; Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313 (5th Cir. 1970) (antitrust).

[18] A review of the doctrine of judicial estoppel also supports the district court result.

[19] 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Heiser v. Woodruff, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970 (1946) (bankruptcy); Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969).

[20] *Heiser*, supra note 19; *Exhibitors Poster*, supra note 17.

In Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., this Court applied federal concepts of finality in an antitrust case springing from certain business practices in Louisiana.[21] The Court eschewed rough hewn results, and carefully balanced the interests implicated in finality determinations:

> The doctrines [of collateral estoppel and res judicata] must be used, however, not as clubs but as fine instruments, that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation.[22]

Bearing this admonition in mind, we address the City's claims that the present suit should be dismissed.

[5] The argument is advanced that collateral estoppel controls the disposition of this case. However, the constitutional issues posed now by Maher were expressly excluded from consideration by the Louisiana Supreme Court. It is thus difficult to perceive in what manner the state court proceeding can operate in the case *sub judice* to estop Maher from airing his allegations. We therefore conclude that collateral estoppel does not prohibit this suit.[23]

[6] The contention that res judiciata prevents Maher's presentation to the federal court requires a rather more subtle sifting of the facts and procedures. For res judicata to interdict an action, the rule is that "a judgment 'on the merits' in a prior suit involving the same parties or

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21 421 F.2d 1313 (5th Cir. 1970).
22 *Id.* at 1316.
23 Nevertheless, collateral estoppel may effectively preclude new litigation of isolated factual issues already determined elsewhere.

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their privies bars a second suit based on the same cause of action."[24] It is not disputed that the state action in City of New Orleans v. Maher was between parties identical with or privy to the parties here, and the judgment in that case was on the merits and final. The inquiry thus centers on whether the cause of action set forth in the present federal case is identical with that in the prior state case.

[7] There is no per se rule that the existence of earlier litigation between the same parties, predicated on a common fact nucleus, establishes res judicata.[25] Rather, in this circuit it has been held,

> The principal test for comparing causes of action is whether or not the primary right and duty, and the delict or wrong are the same in each action.[26]

This test is perhaps easier to formulate than to apply, but in its application we are aided by precedent. In *Exhibitors Poster* this Court tolerated a succession of federal suits presenting related anti-trust claims. Although a single business-policy decision dating from a specific period formed the basis for the suit before the Court as well as the earlier litigation, res judicata did not bar the action, the Court held, because the conduct alleged to be illegal continued, giving rise to new damage claims. After paying due heed to the possible collateral estoppel impact of individual issues previously adjudicated, the Court, focus-

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[24] Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122 (1955); *Exhibitors Poster*, supra note 17.

[25] Wasoff v. American Automobile Ins. Co., 451 F.2d 767 (5th Cir. 1969); DeHart v. Richfield Oil Corp., 395 F.2d 345 (9th Cir. 1968).

[26] 451 F.2d at 769, quoting Seaboard Coast Line R. Co. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969). Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1926).

ing solely on the definition of "cause of action," held that new causes of action were alleged in the later suit.[27]

[8] Since Maher brought the first suit in state court, we must assess the similarity of the two causes of action by reference to the local Louisiana definition of "cause of action." This Court—applying Louisiana law in a franchise dispute—has held no res judicata barrier to a federal suit for breach of contract following a state action for conversion and business injury, both arising out of the same sequence of events.[28] The panel stated that the gists of the actions were different,

> [even though] the language in the two complaints bear some similarity because of the pleading requirements of Louisiana law.[29]

We have examined the causes of action presented in the state and federal cases regarding Maher's zoning battle with the City of New Orleans. The state case was pleaded

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[27] *See* DeHart v. Richfield Oil Corp., 395 F.2d 345 (9th Cir. 1968) (the court must examine precisely what was decided between the parties); Falk v. United States, 375 F.2d 561 (6th Cir. 1967). *See* generally 1B J. Moore, Federal Practice ¶410[1].
By contrast, in *Wasoff*, supra note 25, a dismissal of a federal suit claiming recovery for hail damage was affirmed. It was held that the cause of action was identical with that pursued in an earlier case based on the same insurance contract, the same hailstorm and seeking to recover substantially the same damages. The plaintiff, it was stated, "merely asserted a new theory of relief." 451 F.2d at 769.
In Seaboard Coast Line R. Co. v. Gulf Oil Corp., summary judgment was affirmed against the plaintiff on grounds of res judicata, 409 F.2d 879 (5th Cir. 1969). There, two suits for contractual indemnity were found to state the same cause of action where the allegations were based on similar clauses contained in two different documents of a complex lease-cum-license agreement.
The causes of action set forth in each of the Maher cases bear far less resemblance to one another than the causes of action in *Wasoff* and *Seaboard*.

[28] Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969).

[29] *Id.* at 892.

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flatly as a challenge to the findings and procedures of the City Council and its agencies. The Louisiana Supreme Court declared:

> Neither in the petition nor in any other pleading was there any attack on the legality or constitutionality of Article 14, Section 22A of the Louisiana Constitution, or of the ordinance of the City enacted pursuant thereto.[30]

The state Supreme Court expressly refused to reach the the constitutional arguments offered on appeal by the parties.

[9] Admittedly, there is an overlap in the operative facts respecting both claims. It is true that Maher's success in either action might result in the same ultimate outcome, namely, dismantling the cottage. Nevertheless, the state and federal complaints articulate distinct causes of action—one based on state law, one on federal constitutional precepts.[31] The analysis and precedents employed in making the two arguments are quite distinct. Somewhat disparate proof would be required in assessing whether the City Council has overstepped its authority under Louisiana law, or whether a taking has occurred in contravention of the Fifth Amendment.

We need not decide whehter the same result would obtain had the initial suit been brought in the federal court operating under federal rules and policies respecting

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[30] 235 So.2d at 404.

[31] Since the state court did not address the constitutional questions and since a subsequent state court action would not seem to be barred by local res judicata rules, the court cannot conclude that the present action is foreclosed because the matters raised "should have been litigated" in the earlier suit. *See* note 12 supra.

joinder of claims arising from a common factual basis.[32] All we decide here is that, under the configuration of this case, entwined with local Louisiana pleading and practice rules, disposition of the merits is not foreclosed by res judicata.

Indeed, the very policies favoring an end to litigation point to the immediate adjudication of the merits. At this juncture, no fewer than five tribunals have been presented with Maher's claims respecting the elimination of his cottage. The parties have spent themselves—to date unsuccessfully—to obtain a definitive judicial response. But, even if this Court were to dismiss the present action, litigation between the parties would not necessarily be terminated. Maher might still return to the state courts to pursue his constitutional claim. The interest of judicial peace would thus seem poorly served by a dismissal here granted on grounds of res judicata.

Furthermore, it appears that proceedings have been instituted against Maher for violation of the maintenance clauses of the Vieux Carre Ordinance.[33] As a defense to any prosecution under such provisions the question of an unconstitutional taking of Maher's property might arise, requiring judicial attention in yet another forum.

For these reasons we conclude that res judicata and

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[32] At oral argument an analogy was suggested to England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). *England* adopted a rule for adjudication of state and federal claims in an abstention situation. Had all of Maher's claims been brought as a single matter in the federal court, and had abstention been ordered regarding the state law claims, the *England* case would have been apposite.

[33] Vieux Carre Ordinance §§65-36, -37. The suit against Maher for noncompliance is in abeyance pending resolution of this appeal. *See* note 85 infra.

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collateral estoppel are inapplicable, and that the energy of both the parties and the courts would be best conserved by proceeding to address the merits of Maher's allegations.

### *III. The Vieux Carre Ordinance is a Proper Exercise of the Police Power.*

The Supreme Court has erected wayposts to guide our consideration whether an enactment such as the Vieux Carre Ordinance violates due process. A legislative determination is generally accorded a presumption of constitutionality,[34] but it is nevertheless subjected to several tests before its validity is established. To be sound, the enactment must be within the perimeter of the police power, an authority residing in the law-making body to secure, preserve and promote the general health, welfare and safety.[35] A regulatory ordinance, to be sustained as a suitable exercise of the police power, must bear a real and substantial relation to a legitimate state purpose.[36] The means selected must be reasonable and of general application,[37] and the law must not trench impermissibly on other constitutionally protected interests.[38]

Maher contends that, although the legislative purpose

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[34] Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[35] Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1959).

[36] Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) (family values); Paris Adult Theatre I v. Slater, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) (quality of life); *Euclid*, supra note 34 (health, traffic, safety); Walls v. Midland Carbon Co., 254 U.S. 300, 41 S.Ct. 118, 65 L.Ed. 276 (1920) (preserve natural gas resource), Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894) (preserve fishery resource); Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (discourage intoxication).

[37] *Berman*, supra note 35; *Euclid*, supra note 34; Reinman v. Little Rock, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915).

[38] *Belle Terre*, supra note 36; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *Mugler*, *supra* note 36.

underlying the preservation of the Vieux Carre, may be unobjectionable, the general program of effectuation as well as the denial of Maher's demolition permit have inadequate standards and an arbitrary enforcement that violate due process. Furthermore, he asserts that the law is confiscatory in its operation and constitutes a taking that requires compensation.

[10, 11] A substantial body of precedent exists respecting the appropriate balancing of interests where an ordinance diminishes the freedom of an individual owner to dispose of his property in the name of what the lawmaker deems the greater public benefit. It is generally accepted that legislative bodies[39] are entrusted with the task of defining the public interest and purpose, and of enacting laws in furtherance of the general good.[40] The Supreme Court has made it clear that, while the police power is not unlimited, its boundaries are both ample and protean.[41] Drawing on the rich and flexible police power, a legislature has the authority to respond to economic and cultural developments cast in a different mold, and to essay new solutions to new problems. In Village of Euclid v. Ambler Realty Co., the watershed case upholding the right of a municipality to enact a general zoning ordinance, the Supreme Court observed:

> [P]roblems have developed, and constantly are developing, which require, and will continue to require,

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39 Local ordinances are accorded the same Fifth Amendment due process and "taking" analysis as state statutes. *See, e. g., Goldblatt*, supra note 34; Seattle Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928); *Euclid*, supra note 34.

40 *Belle Terre*, supra note 36; *Goldblatt*, supra note 34; *Berman*, supra note 35; *Mahon*, supra note 38; *Midland Carbon*, supra note 36.

41 *Paris Adult Theatre*, supra note 36; *Berman*, supra note 35; *Euclid*, supra note 34; Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915).

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> additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.[42]

Accordingly, no fixed constraints may be placed on the police power for the future. Rather, each case must be evaluated as it arises, on its own facts and in light of the prevailing circumstances.[43]

[12] A keystone of due process analysis is the determination that the state purpose to be served is legitimate. It would therefore appear beneficial to detail the substantial support that exists for a legislative determination to preserve historic landmarks and districts.[44]

The Ordinance in question here declares as its objective:

> The Vieux Carre shall have for its purpose the preservation of such buildings in the Vieux Carre section of the City as, in the opinion of the Commission,

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[42] 272 U.S. at 386-87, 47 S.Ct. at 118.

[43] *Berman; Euclid.*

[44] The district court stated:

> The courts have repeatedly sustained the validity of architectural control ordinances as police power regulation, especially when historic or touristic districts like the Vieux Carre are concerned."

371 F.Supp. at 661, citing Santa Fe v. Gamble, Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Town of Deering ex rel. Bittenbender v. Tibbets, 105 N.H. 481, 202 A.2d 232 (1964); Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963); Opinion of Justices, 103 N.H. 268, 169 A.2d 762 (1961); Sunad, Inc. v. City of Sarasota, 122 So.2d 611 (Fla.1960); State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, cert. den. 350 U.S. 841, 76 S.Ct. 81, 100 L.Ed. 750 (1955); Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955); New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953).

shall have architectural and historical value and which should be preserved for the benefit of the people of the City and State.[45]

[13] Proper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy. In Berman v. Parker the Supreme Court, giving "well-nigh conclusive" effect to the legislative determination of community needs and solutions, upheld the purposes of a slum clearance program designed to "develop a more balanced, more attractive community."[46]

[14] Nor need the values advanced be solely economic or directed at health and safety in their narrowest senses. The police power inhering in the lawmaker is more generous, comprehending more subtle and ephemeral societal interests. "The values [that the police power] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the domain of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[47]

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[45] Vieux Carre Ordinance §65-6. In addition to conferring cultural benefits, it is not contested that preservation of the Vieux Carre district promotes the economic welfare of the city by attracting tourists. *See also* La.Const. supra note 4.

[46] 348 U.S. 26, 32, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). To like effect, *see* Village of Belle Terre v. Boraas, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974) ("the police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values . . . and the blessings of quiet seclusion . . . make the area a sanctuary for people."); *Euclid*, supra note 34.

[47] *Berman*, 348 U.S. at 33, 75 S.Ct. at 102. *Paris Adult Theatre*, supra note 36 (police power includes authority to regulate against obscenity). The Supreme Court has also affirmed the power of legislatures to enact protective measures regulating the use of the natural resources of the community. Walls vs. Midland Carbon Co., 254 U.S. 300, 41 S.Ct. 118, 65 L.Ed. 276 (1920) (natural gas); Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894) (fish).

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This circuit has held in Stone v. City of Maitland that zoning ordinances may be sustained under the police power where motivated by a desire to "enhanc[e] the aesthetic appeal of a community."[48] The Court noted with approbation city action to maintain "the value of scenic surroundings" and "the preservation of the quality of our environment."[49]

One of the nation's distinctive historic districts is found in New Orleans. The federal,[50] state and local government have each ascertained that benefits would be conferred on society by preservation of the French Quarter.

Throughout the country, there appears to be a burgeoning awareness that our heritage and culture are treasured national assets. Many locales endowed with historic sites have enacted protective measures for them. The Vieux Carre Ordinance is among the earliest efforts in this regard, and has served as a prototype for similar enactments elsewhere.[51]

The federal government also has acknowledged our debt to the past, in the National Historic Preservation Act of 1966:

The Congress finds and declares—

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of

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48 446 F.2d 83, 89 (5th Cir. 1971).
49 *Id.*
50 *See* notes 52-53, infra, and accompanying text.
51 *See, e.g.*, the legislation under discussion is cases at note 44, supra.

> the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people . . ..[52]

An Advisory Committee on Historic Preservation was established, and a National Register of Historic Places was developed that included the Vieux Carre.[53]

[15] The Court is not free to reverse the considered judgment of the legislature that it is in the public interest to preserve the status quo in the Vieux Carre and to scrutinize closely any proposed change in the ambiance by private owners. Where a legislative determination is "fairly debatable, the legislative judgment must be allowed to control."[54] We thus conclude that, considering the nationwide sentiment for preserving the country's heritage and with particular regard to the context of the unique and characteristic French Quarter, the objective of the Vieux Carre Ordinance falls within the permissible scope of the police power.

[16] Since we deal here with legislation designed to effect a legitimate economic and social policy, so long as

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[52] 16 U.S.C. §470 (1974). *See also* 42 U.S.C. §1460(b) (1970) (federal support for local historic preservation in urban renewal programs). The problem of landmark and historic district preservation has generated considerable scholarly attention. J. Costonis, Space Adrift: Saving Urban Landmarks Through the Chicago Plan (1974). Forman, Historic Preservation and Urban Development Law in Louisiana, 21 La.B.J. 197 (1974); Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971); Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165 (1967); Note, 63 Colum.L.Rev. 708 (1963).
*See also* Aesthetics vs. Free Enterprise—A Symposium, 15 Prac.Law. 17 (1969); Legal Methods of Historic Preservation, 19 Buffalo L.Rev. 611 (1970).

[53] National Park Service, The National Register of Historic Places, 103-06 (1969).

[54] *Euclid*, 272 U.S. at 388, 47 S.Ct. at 118. *See also Paris Adult Theatre*, supra note 36; *Goldblatt*, supra note 34.

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the means chosen—a matter largely entrusted to the legislature—are reasonable and not arbitrary, due process is satisfied.[55] It is not disputed that the Vieux Carre Ordinance furthers the object of preserving the character of the district in a meaningful fashion.

The Ordinance is of general application to a well-defined geographic area. In addition, it establishes a Commission whose professional qualifications and means of selection are delineated. Within the boundaries of the French Quarter, the Commission is directed to review plans for all proposed demolition or construction and its duties and procedures are specific. After due consideration the Commission reports its recommendations to the Director of the Department of Safety and Permits, whereupon a permit for the proposed work may issue. Provision is made for review by the City Council.[56]

Though generally the procedures ordained are not faulted,[57] Maher attacks the schema as violative of due process because, in his view, it provides inadequate guidance to the Commission for the exercise of its administrative judgment. The City concedes that no official objective standards have been promulgated in this regard. Maher suggests that formal standards are mandatory to guide

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55 *Berman*, supra note 35; *Euclid*, supra note 34.

56 *See* note 66, infra.

57 The suggestion was advanced that the Ordinance has been, and continues to be, enforced in an arbitrary fashion and not altogether free from influence. Evidence, including a federally funded report on the Commission's operations, was inserted in the record to support such claims. Charges that improper considerations play a role in decision making respecting the French Quarter merit serious attention by the Court. The district court decided that on balance, the allegations in this respect were not substantiated by the record. On review, we affirm the district court on the basis that its result finds support in the record and is not clearly erroneous. In so affirming, however, we pause to note that past enforcement of the Ordinance does not seem to have been uniformly predictable.

the Commission in its resolution of the buildings deserving of preservation.

[17] To satisfy due process, guidelines to aid a commission charged with implementing a public zoning purpose need not be so rigidly drawn as to prejudge the outcome in each case, precluding reasonable administrative discretion. Because of the circumstances pertaining to the Vieux Carre, we conclude that the Ordinance provides adequate legislative direction to the Commission to enable it to perform its functions consonant with the due process clause.

[18] While concerns of aesthetic or historical preservation do not admit to precise quantification, certain firm steps have been undertaken here to assure that the Commission would not be adrift to act without standards in an impermissible fashion. First, the Louisiana constitution,[58] the Vieux Carre Ordinance[59] and, by interpretation, the Supreme Court of Louisiana,[60] have specified their expectations for the Vieux Carre, and the values to be implemented by the legislation.

Further, the legislature exercises substantial control over the Commission's decision making in several ways. Where possible, the ordinance is precise, as for example in delineating the district,[61] defining what alterations in

[58] La.Const. Art. XIV, §22A, urges the City to protect "the quaint and distinctive character of the area." *See* note 4 *supra*.

[59] Vieux Carre Ordinance §65-6 charges the Commission to "preserv[e] such buildings . . . [as] shall have architectural and historical value and which should be preserved for the benefit of the people. . . ."

[60] *See, e. g.*, City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129, 131 (1941), which characterized the Commission's purpose as "preserv[ing] the antiquity of the whole French and Spanish Quarter, the tout ensemble, so to speak, by defending this relic [the Vieux Carre] against iconoclasm or vandalism."

[61] Vieux Carre Ordinance §65-6.

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which locations require approval,[62] and particularly regulating items of special interest, such as floodlights, overhanging balconies or signs.[63]

Another method by which the lawmaking body curbed the possibility for abuse by the Commission was by specifying the composition of that body and its manner of selection.[64] Thus, the City is assured that the Commission includes architects, historians and business persons offering complementary skills, experience and interests.

The elaborate decision-making and appeal process set forth in the ordinance creates another structural check on any potential for arbitrariness that might exist.[65] Decisions of the Commission may be reviewed ultimately by

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[62] Vieux Carre Ordinance §65-8 (Ordinance extends to exterior work on any building that fronts on a public street or alley within the Vieux Carre). *See* note 5, supra.

[63] Vieux Carre Ordinance §§56-11; -13; -17 to -23.

[64] Vieux Carre Ordinance §§56-2 to -4. *Recommendation and appointment of members.*

The Vieux Carre Commission shall consist of nine members, all of whom shall be citizens of the city. They shall be appointed by the Mayor with the advice and consent of the Council. The members of the Commission shall be appointed by the Mayor as follows: one from a list of two persons recommended by the Louisiana Historical Society; one from a list of two persons recommended by the Curators of the Louisiana State Museum; one from a list of two persons recommended by the Association of Commerce of the city; three qualified architects from a list of six qualified architects recommended by the New Orleans Chapter of the American Institute of Architects and three at large.

§65-3. *Term; vacancies.*

Each of the members of the Vieux Carre Commission shall be appointed for a term of four years. Whenever the term of a member of the Commission expires the Mayor shall appoint his successor from a list selected by the body which made the original selection from which the vacancy has occurred.

§65-4. *Employees and committees.*

The Vieux Carre Commission may select and employ such persons as may be necessary to carry out the purposes for which it is created. The City Attorney shall be ex officio the attorney for the Commission. The Commission may designate and appoint, from among its members, various committees with such powers and duties as the Commission may have and prescribe.

[65] Vieux Carre Ordinance §§65-5; -8 to -10.

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the City Council itself. Indeed, that is the procedure that was followed in the present case.[66]

It is true, as Maher observed, that no officially promulgated regulations pinpoint each decision by the Commission. Nonetheless, apart from the evident purpose of the legislation and the taut lines of review maintained by the legislature over the operation of the Commission, other fertile sources are readily available to promote a reasoned exercise of the professional and scholarly judgment of the Commission. It may be difficult to capture the atmosphere of a region through a set of regulations. However, it would seem that old city plans and historic documents, as well as photographs and contemporary writings may provide an abundant and accurate compilation of data to guide the Commission. And the district court observed,

> In this case, the meaning of a mandate to preserve the character of the Vieux Carre "takes clear meaning from the observable character of the district to which it applies."[67]

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[66] The Ordinance provides for review by the City Council of a disapproved petition. §65-10. No provision expressly exists for appealing the grant of a permit, but the Louisiana Supreme Court has interpreted the Ordinance to allow such review as well. Maher v. City of New Orleans, 256 La. 131, 235 So.2d 402 (1970). Its determination of Louisiana law is binding on this Court. Reinman v. City of Little Rock, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 600 (1915).
At oral argument it was contended that an element of arbitrariness was interjected by the right to appeal from the Commission, a body of experts, to the City Council, a legislative body responsive to the electoral process. The apparent suggestion was that the City Council does not enjoy the expert status of the Commission and, in addition, would be susceptible to political pressure in reaching its decisions. We reject such an intimation here. The expert status of the Commission members is particularly relevant to sustain its ability to function under power delegated by the legislature; the legislators themselves are the repository of public trust, and no delegation problem arises where the City Council itself decides a matter. Insofar as the suggestion is of impropriety, we affirm the district court conclusion that the proof was inadequate. *See* note 57 supra.

[67] 371 F.Supp. at 664, *quoting* Town of Deering ex rel. Bittenbender v. Tibbets, 105 N.H. 481, 202 A.2d 232 (1964).

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Aside from such contemporary indicia of the nature and appearance of the French Quarter at earlier times, the Commission has the advantage at present of a recent impartial architectural and historical study of the structures in the area. The Vieux Carre Survey Advisory Committee conducted its analysis under a grant to Tulane University from the Edward G. Schleider Foundation. Building by building, the Committee assessed the merit of each structure with respect to several factors. For example, regarding the Maher cottage at issue here, the Louisiana Supreme Court noted that the Survey Committee "was of the opinion that this cottage was worthy of preservation as part of the overall scene."[68] While the Schleider survey in no way binds the Commission, it does furnish an independent and objective judgment respecting the edifices in the area. The existence of the survey and other historical source material assist in mooring the Commission's discretion firmly to the legislative purpose.[69]

We thus conclude that the present zoning ordinance, enacted to promote the social and economic goals of preserving an historical district judged of public value, does not delegate unfettered authority to the Vieux Carre Commission. Rather, the legislature has provided adequate structure and guidelines to that administrative body.

Although it primarily concerned a taking, Berman v.

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[68] 235 So.2d 402, 407, n. 4.

[69] In this regard, we find the present case distinguishable from Barnes v. Merritt, 428 F.2d 284 (5th Cir. 1970), and Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). In those cases successful attacks were mounted on the denial of liquor permits, because of a total absence of proper standards to govern the administrative discretion. This circuit found that the unfettered, unreviewable power granted the agency in those situations offended due process.

Parker[70] supplies an apt analogy to the present situation. The question arose whether it was necessary to have legislative guidance for each individual decision in a context of a district-wide project to eliminate slums and blighted areas. A redevelopment agency had decided to raze an entire district, and an individual owner objected to implementing the decision with respect to its property, insisting that its building should be allowed to stand because it was safe, sanitary and profitable.

The Supreme Court held that the agency, acting with the needs of the whole community in mind and the advantage of expert consultation, was free to implement its mandate with respect to the entire district without the need for a specific showing in each case that its action was necessary to the purpose of the legislation. Allowing each affected party to challenge the basis for an agency determination could thwart a comprehensive project, the Court held. It would appear that the Vieux Carre Commission, like the agency in *Berman*, acts in harmony with the public interest and directive, affords procedural fairness, and utilizes expert assistance.

By contrast, there is a case in which the Supreme Court did strike down a zoning regulation because of its improper delegation of arbitrary, unreviewable decision-making power by the enacting body. In Seattle Trust Co. v. Roberge,[71] a local ordinance prohibited the erection of a philanthropic institution in a specified area, unless written consent was acquired from surrounding neighbors. Such provision, the Court held, violated due process, because no standards existed to govern consent, and consent

[70] 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1959).
[71] 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928).

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could be withheld for any reason or for no reason. An owner was afforded no review or other recourse, and was thus entirely subject to the caprice of its neighbors.

[19] In addition to his argument, that the ordinance is arbitrary for want of standards, Maher asserts that the ordinance as applied to him was arbitrary, because the decision of the City Council to prohibit him from leveling the Dumaine Street residence was unsupported by reasons.[72] The district court, faced with this contention stated,

> Considerable testimony supported the [Council's] position that the Maher cottage had substantial architectural value as part of the Vieux Carre scene as well as some individual architectural merit.
>
> . . . . .
>
> [Although] a finding [in Maher's favor] would have certainly been possible [,] . . . [t]he fact that the city authorities did not ultimately agree . . . does not make their action arbitrary.[73]
>
> The district court was persuaded that [T]his case has not been an example so much of a lack of standards as a disagreement as to whether the Maher cottage qualified for demolition under the applicable standards. In view of the whole record of this case, it is the opinion of the Court that since the City Council, rather than acting arbitrarily, merely resolved a

[72] The adequacy of the factual basis for the decision to withhold the Dumaine cottage demolition permit was determined on the merits by the Louisiana Supreme Court, 235 So.2d at 406. It would therefore seem that the value of retaining the cottage is established by collateral estoppel, leaving open constitutional questions only. *See* note 23 supra.

[73] 371 F.Supp. at 663.

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fair, albeit heated, difference of opinion, the judgment of that zoning authority should be followed.[74]

As a reviewing tribunal, we cannot detect reversible error in the district court's conclusion.

*IV. There is no Taking of the Dumaine Cottage that Would Require the Payment of Compensation.*

Maher presents a twofold basis for his contention that the application of the Vieux Carre Ordinance to the cottage constitutes a taking of his property. First, he claims that unless he can build the desired apartment complex, he may not pursue the most profitable use to which his property may be put. Second, he asserts that the city may not permissibly impose an affirmative maintenance duty upon a property owner without taking the property under the power of eminent domain. We deal with these two contentions in turn.

[20] To survive attack as a taking, the zoning regulation must—as a threshold matter—satisfy the due process requirements that its purpose and means are reasonable. Even if it comports with due process, a regulatory ordinance may nonetheless be a taking if it is unduly onerous so as to be confiscatory. The Supreme Court has held that every regulation is in some sense a prohibition[75] and that whether a given regulation treads over the line of proper regulation and operates as a taking of property is a matter to be determined under all the circumstances in a specific case. Justice Holmes has remarked:

Constitutional rights like others are matters of de-

[74] *Id.* at 664.
[75] *Euclid*, supra note 30.

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> gree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain.[76]

The Supreme Court repeatedly made clear that an ordinance within the police power does not become an unconstitutional taking merely because, as a result of its operation, property does not achieve its maximum economic potential.[77] In Goldblatt v. Hempstead an ordinance was amended to forbid excavation below the water table. Goldblatt owned property theretofore dedicated to quarrying which had through the years created a rather deep lake of several acres. The ordinance as applied to Goldblatt substantially reduced the value of his property and its potential utility. The Supreme Court nevertheless upheld the validity of the measure as a reasonable regulation, stating,

> Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance otherwise is a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.[78]

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[76] Martin v. District of Columbia, 205 U.S. 135, 139, 27 S.Ct. 440, 441, 51 L.Ed. 743 (1907).

[77] Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915).

[78] 369 U.S. at 593, 82 S.Ct. at 989, citing cases.

Relying on Mugler v. Kansas,[79] the Supreme Court in *Goldblatt* observed that a properly enacted prohibition against a use of property for purposes adverse to the public weal is not controlled by the doctrine of eminent domain. Such regulation "is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain . . .."[80]

The Court's attention has been directed to ordinances of other municipalities where the authority to prohibit destruction of designated buildings is more limited. Refusals to allow razing may be accompanied by tax credit arrangements, by permission to transfer "building rights" to other owners or by other economic incentives or palliatives; ordinances may prohibit demolition conditionally or temporarily.[81] Such measures may be considered wiser or fairer by a legislature which contemplates an historic preservation enactment. All we must decide today is whether an enactment that does not furnish alleviating devices may be constitutional.

[21] An ordinance forbidding the demolition of certain structures, if it serves a permissible goal in an otherwise reasonable fashion, does not seem on its face constitutionally distinguishable from ordinances regulating other as-

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[79] 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

[80] 369 U.S. at 593, 82 S.Ct. at 989, *quoting* Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

[81] *See, e. g.*, Building and Zone Code of Portland, Oregon, Chapter 33.120, Historical Buildings and Sites (delay in grant of demolition permit to allow for public or private acquisition); Code of the City of Alexandria, Virginia, Article 14 (same); Administrative Code of the City of New York, Section 207.1.9 (demolition permit will issue if owner shows loss or inadequate return on property). *See generally* Costonis, supra note 52.

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pects of land ownership, such as building height, set back or limitations on use. We conclude that the provision requiring a permit before demolition and the fact that in some cases permits may not be obtained does not alone make out a case of taking.

[22, 23] As the ordinance was applied to Maher, the denial of the permit to demolish and rebuild does not operate as a classic example of eminent domain, namely, a taking of Maher's property for government use.[82] Nor did Maher demonstrate to the satisfaction of the district court that a taking occurred because the ordinance so diminished the property value as to leave Maher, in effect, nothing.[83] In particular, Maher did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed.[84] To the extent that such is the theory underlying Maher's claim, it fails for lack of proof.

We finally consider Maher's objection to that portion of the ordinance requiring reasonable maintenance and

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[82] *See* United States v. Central Eureka Mining Co., 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958). *But see* Keystone Associates v. Moerdler, 19 N.Y.2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700, aff'd 19 N.Y.2d 598, 278 N.Y.S.2d 243, 224 N.E.2d 744 (Ct.Appeals 1967) (a taking of property of the old Metropolitan Opera House found where demolition was retarded and use limited severely).

[83] In any case, while a substantial diminution in value may be evidence of a taking, "it is by no means conclusive." Goldblatt v. Hempstead, 369 U.S. at 594, 82 S.Ct. at 990. *See also Euclid*, supra.

[84] Maher objects strenuously to the district court's observation that rental values in the French Quarter are reputedly relatively high. We need not decide whether judicial notice was improperly exercised in this regard, for any error that may have occurred was not reversible. We also find unpersuasive Maher's contention that a critical fact is that he inherited the property rather than purchasing it.

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repair of buildings in the French Quarter.[85] By imposing an affirmative duty on property owners to prevent and correct defects, Maher claims that the City Council has overstepped permissible bounds of police power and by requiring him to make expenditures has effectively taken his property. To do this, Maher invokes the eminent domain provisions and demands just compensation.

[24] Tests set forth by the Supreme Court again inform our analysis.[86] Once it has been determined that the purpose of the Vieux Carre legislation is a proper one, upkeep of buildings appears reasonably necessary to the accomplishment of the goals of the ordinance.[87] As noted above, the responsibility for determining the wisdom of a legislative determination is not lodged with the judiciary.

The fact that an owner may incidentally be required to make out-of-pocket expenditures in order to remain in compliance with an ordinance does not per se render that ordinance a taking. In the interest of safety, it would seem that an ordinance might reasonably require buildings to have fire sprinklers or to provide emergency facilities for exits and light. In pursuit of health, provisions for

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[85] Vieux Carre Ordinance §65-36. *Preservation of existing structures by owner or person having legal custody thereof.*

> All buildings and structures in that section of the city known as the Vieux Carre Section . . . shall be preserved against decay and deterioration and free from certain structural defects in the following manner, by the owner thereof . . . [who] . . . shall repair such building if it is found to have any of the following defects:

There follows a list of unsafe, nonweather sound and deteriorated conditions, including falling portions of buildings, deteriorated or inadequate foundation, floors, walls, support, ceilings, roofs, chimneys, and ineffectively weathertight exterior or windows.
Under Section 65-37, charges may be brought against a noncomplying owner. *See* note 33 supra.

[86] *Goldblatt* supra note 34; *Euclid* supra note 34. In *Goldblatt*, the Supreme Court did not reach the question whether an affirmative duty to erect a fence and fill in the lake was overly burdensome and beyond the police power.

[87] *Goldblatt*, supra note 34. *Euclid*, supra note 34.

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plumbing or sewage disposal might be demanded. Compliance could well require owners to spend money. Yet, if the purpose be legitimate and the means reasonably consistent with the objective, the ordinance can withstand a frontal attack of invalidity.

Our decision is narrow regarding the requirement reasonably to maintain property in the French Quarter. In holding that the ordinance provision necessitating reasonable maintenance is constitutional, we do not conclude that every application of such an ordinance would be beyond constitutional assault. For, as the Supreme Court emphasized in *Goldblatt*, even a generally constitutional regulation may become a taking in an isolated application if "unduly oppressive" to a property owner.[88] It may be that, in some set of circumstances, the expense of maintenance under the Ordinance—were the city to exact compliance—would be so unreasonable as to constitute a taking.[89]

[25, 26] The burden of proof as to this point falls on the party alleging the taking.[90] On the evidence presented here, the district court found that Maher had not sustained his burden of demonstrating that the upkeep provisions were inordinately burdensome.[91] We go no further than to state that we cannot find the district court determination in this regard to be erroneous.

*V. Conclusion.*

The Vieux Carre Ordinance was enacted to pursue the legitimate state goal of preserving the "tout ensemble" of

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[88] 369 U.S. at 595, 82 S.Ct. 987, *quoting* Lawton v. Steele, 152 U.S. 133, 137, 14 S.Ct. 499, 38 L.Ed. 385 (1894).
[89] *See Keystone Associates*, note 82 supra.
[90] *Goldblatt*, 367 U.S. at 596, 82 S.Ct. 987.
[91] 371 F. Supp. at 662.

the historic French Quarter. The provisions of the Ordinance appear to constitute permissible means adapted to secure that end. Furthermore, the operations of the Vieux Carre Commission satisfy due process standards in that they provide reasonable legislative and practical guidance to, and control over, administrative decision making.

Once the district court concluded it was at liberty, under principles of finality, to reach the merits of Maher's case, that court was not persuaded that the denial of a demolition permit was arbitrary. It did not find that the ordinance as applied to Maher constituted a taking of Maher's property for which compensation was indicated. These determinations, based on the proof proffered there, are not clearly erroneous.

An order will, therefore, be entered affirming the judgment of the district court.

Affirmed.

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## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1974

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No. 74-2022

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D. C. Docket No. CA 71-119 "B"

PAULA-BETH LASHLEY MAHER, Administratrix
of the Succession of Morris G. Maher,
Plaintiff-Appellant,

versus

THE CITY OF NEW ORLEANS, ET AL.,
Defendants-Appellees.

*Appeal from the United States District Court for the*
Eastern District of Louisiana

Before GEWIN, DYER and ADAMS,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

July 31, 1975

Issued as Mandate: Oct. 6, 1975

* Of the Third Circuit, sitting by designation.

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**APPENDIX C**

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

September 26, 1975

TO ALL COUNSEL OF RECORD

No. 74-2022—Paula-Beth Lashley Maher, etc. vs. The City of New Orleans, et al.

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth, Clerk

by Clare F. Sacks
Deputy Clerk

cc: Messrs. Harold B. Carter, Jr.
Walter M. Barnett
Mr. Caryl H. Vesy
Mr. James G. Derbes

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## APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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Civil Action No. 71-119 Section B

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MORRIS G. MAHER

versus

THE CITY OF NEW ORLEANS, THE DIRECTOR OF THE DEPARTMENT OF SAFETY AND PERMITS OF THE CITY OF NEW ORLEANS, THE VIEUX CARRE COMMISSION and THE CITY COUNCIL OF THE CITY OF NEW ORLEANS

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### OPINION

HEEBE, Chief Judge:

The original plaintiff in this action, Morris G. Maher, was the owner of properties located at 810 and 818-822 Dumaine Street in the Vieux Carre, or French Quarter, section of New Orleans. All property in the Vieux Carre, apart from a few specific exceptions, is subject to the provisions of the Vieux Carre ordinance passed by the City Council pursuant to a grant of authority contained in Art. XIV, Sec. 22A of the Louisiana Constitution. The ordinance creates the Vieux Carre Commission, a nine-member body charged with "the preservation of such buildings in the Vieux Carre section of the city, as in the opin-

ion of the Commission, shall have architectural and historical value and which should be preserved for the benefit of the people of the city and state." Code of the City of New Orleans §65-6. The duties of the Commission include the review of detailed plans for any construction, demolition or alteration work done in the French Quarter. The ordinance also provides in part:

"Section 65-8. Submission of plans for exterior changes to Commission.

"Before the commencement of any work in the erection of any new building or in the alteration or addition to, or painting or repainting or demolishing of any existing building, any portion of whch is to front on any public street or alley in the Vieux Carre Section, application by the owner for a permit therefor shall be made to the Vieux Carre Commission, accompanied by the full plans and specifications thereof so far as they relate to the proposed appearance, color, texture of materials and architectural design of the exterior, including the front, sides, rear and roof of such building, alteration or addition or of any out building, party wall, courtyard, fence or other dependency thereof. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085, §1.)

"Section 65-9. Commission recommendations and action thereon.

"The Vieux Carre Commission shall upon due consideration report thereon promptly its recommendations, including such changes, if any, as in its judgment are reasonably necessary to comply with the

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requirements of this chapter, by sending them, in writing, to the Director of the Department of Safety and Permits with the application and documents referred to in this article and, if they are found by the Director to comply reasonably with the requirements of this article and if such application and intended work shall conform also to all other regulations, ordinances and laws of the city, the Director shall issue promptly a permit for such work and indicate on such permit the extent and nature of the work to be performed thereunder. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085, §1.)

"Section 65-10. When Director to submit question to Council; action of Council.

"If the applicant for a permit shall refuse to accede to reasonable changes recommended by the Vieux Carre Commission, if the Commission shall disapprove any application or if the Director of the Department of Safety and Permits finds that the recommendations of the Commission do not comply reasonably with the requirements of this article, the Director shall within not later than five days, forward such matters with his written comments to the Council for such action as in its judgment, after notice and affording an opportunity to the applicant and to the Commission and other protesting parties to be heard, shall effect reasonable compliance with such recommendations and this article. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085, §1.)"

Mr. Maher, until his recent death, resided at 810 Dumaine. The property at 818-820 Dumaine, a Victorian cot-

tage next door to the residence, is the subject of over ten years of arduous and determined legal struggle.

In March of 1963, Mr. Maher applied to the Vieux Carre Commission for authority to demolish the cottage and replace it with an addition to his home. The addition would have included seven rent-producing apartments.

Although the Architectural Committee of the Commission had approved the construction plans, the Vieux Carre Commission disapproved the application to demolish on April 16, 1963. A number of property owners, the Vieux Carre Property Owners and Associates, Inc., the French Quarter Residents Association and the Louisiana Council for the Vieux Carre had strenuously opposed demolition.

On June 18, 1963, after considering a letter from Mr. Maher's architect, the Commission voted to obtain a report from the Vieux Carre Survey Advisory Committee. The Committee was in the process of making an architectural analysis for the entire French Quarter through the use of a survey conducted by the Schleider Foundation in connection with Tulane University. That report classified the cottage as "worthy of preservation as part of the scene."

On September 17, 1963, the Vieux Carre Commission again disapproved of the application to demolish.

On October 31, 1963, Mr. Maher again applied to the Commission. On December 17, 1963, the Commission, meeting in a closed session, overruled its two previous decisions and granted the application to demonish.

On February 13, 1964, a group of property owners,

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acting under the name of the Vieux Carre Property Owners and Associates, Inc., appealed the decision of the Vieux Carre Commission to the City Council. The Council, after a hearing, resolved that the cottage had architectual or historical value, overruled the decision of the Commission and ordered the Director of the Department of Safety and Permits of the City of New Orleans not to issue a demolition permit to Mr. Maher.

On July 23, 1964, Mr. Maher filed suit in Civil District Court for Orleans Parish asking that the decision of the City Council be held null and void. At this time, it was agreed by all parties to the suit that the action of the Council was indeed void since the Council had considered the matter before Mr. Maher had requested a permit from the City Department of Safety and Permits to demolish the cottage. Mr. Maher applied to the Department for his permit but was refused. He then appealed to the City Council for a reversal of the action of the Department.

On August 16, 1966, after a hearing, the Council reaffirmed its previous ruling and overruled the Vieux Carre Commission's grant of the demolition permit.

The suit in Civil District Court was resumed, and on December 7, 1967, was tried. On February 26, 1968, Judge Garvey, without written reasons, rendered judgment "as prayed" in favor of the plaintiff.

On appeal, the Louisiana Court of Appeal for the Fourth Circuit reversed the trial court and dismissed the suit. The court, in an opinion reported at 222 So. 2d 608 (La. App.1969), held that the action of the City Council was

proper and that the Vieux Carre Ordinance was constitutional both on its face and as applied in Mr. Maher's case.

Mr. Maher applied to the Louisiana Supreme Court for writs of review. These were granted, and the court affirmed the judgment of the court of appeal denying the demolition permit. In its opinion, the court held that the actions of the City Council were proper under Louisiana law but declined to consider any attack on the constitutionality of the ordinance since "no plea attacking its constitutionality for any reason was filed in the district court. • • • Consequently [constitutional issues] cannot be considered by us now." Maher v. City of New Orleans, 256 La. 131, 235 So.2d 402, 405 (1970). In a footnote, the court observed that

> "Apparently without realizing that the constitutional issue had not pleaded (sic) in the trial court the Court of Appeal did pass on the constitutional question set out in assignment of error "B" and held that our decision (sic) in City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 and City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798 in which we maintained the validity of the ordinance had set at rest the question of whether or not the ordinance was subject to attack because it was too vague and indefinite. We are inclined to agree." 235 So.2d at 405, fn. 3.

In passing, the court noted that it was completely satisfied that "the Maher cottage composed part of the elusive 'tout ensemble' of the Vieux Carre as described by this Court . . . and that it does have architectural value."

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On January 14, 1971, Mr. Maher filed suit in this court seeking a declaration of the unconstitutionality of the Vieux Carre ordinance and an injunction against its enforcement. He, and now his estate, have challenged the constitutionality of the ordinance, both on its face and as applied.

The threshold legal issue in this case concerns the effect of the labyrinthine history of the dispute on the present feedral suit. Defendants claim that the suit is barred by the law of *res judicata* and/or judicial or collateral estoppel. They rely on the proposition that a final judgment of a court having jurisdiction over the parties and the subject matter puts an end, not only to every plea or defense made, but to every plea or defense which either of the parties might have raised.

This view undoubtedly expresses a common law maxim but the law of Louisiana, in this area as in others, has grown from roots foreign to the common law heritage of her sister states.

*Res judicata* in Louisiana law is founded on Article 2286 of the Louisiana Civil Code of 1870, which is a literal translation of Article 1351 of the French Civil Code.[1] The article provides:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judg-

[1] Article 1351 reads: "L'autorite de la chose jugee n'a lieu qu'a l'egard de ce qui a fait l'objet du jugement. Il faut que la chose demandee soit meme; que la demande soit fondee sur la meme cause; que la demande soit entre les memes parties, et formee par elles et contre elles en la meme qualite. This article was borrowed from Pothier, who in turn took it from the Roman jurisconsults. O'Quin, Res Judicata—"Matters Which Might Have Been Pleaded," 2 La.L.Rev. 347 (1940), hereinafter referred to O'Quin I.

ment. The thing demanded must be the same; the demand must be founded on the same cause of action;[2] the demand must be between the same parties and formed by them against each other in the same quality."

Article 1351 of the French Civil Code is interpreted, with a few exceptions not relevant here,[3] to mean that "[i]n general, it may be said that no matters except those of evidentiary nature are concluded by a judgment, unless they were actually submitted to the decision of the court." O'Quin, Res Judicata—"Matters Which Might Have Been Pleaded" 2 La.L.Rev.340, 364 (1940), hereinafter referred to as O'Quin I. For example, in French law "failure in a suit for the nullity of a contract for vices of consent cannot bar a second action for its resolution on the ground of nonperformance of the defendants' obligations." O'Quin I, *supra*, at 359.

Under these principles of French law, the present suit would not be barred by a previous decision in which the constitutional issues raised here were not decided either expressly or by necessary implication.[4] That discovery

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2 "Cause" would be a better translation than "cause of action." For an extended discussion of the meaning of "cause," *see* O'Quin I, *supra*. *Compare*, New Orleans Fire Assoc. Local 632 v. City of N. O., 263 La. 649, 269 So.2d 194, 199, n.3 (1972).

3 Such as a suit for redhibition, which bars a subsequent suit for dimunition of price. This problem is covered in Louisiana by Civil Code Art. 2543. O'Quin I, at 360.

4 "The authority of the thing adjudged attaches only to the *dispositif* (the actual decision), and not to the *motifs* (reasons for the decision); and it applies only to those parts of the *dispositif* as have actually been submitted to a court by the parties, and decided by the judgment. Hence a judgment granting alimony to a plaintiff, on the grounds that he is the defendant's child, does not conclude the question of the plaintiff's filiation unless this issue was raised and actually litigated by the parties. To determine this, the *dispositif* is interpreted by reference to the pleadings in the case. Whenever the application of res judicata is doubtful, the exception should be rejected." O'Quin I at 363 and commentators cited in notes 79-84 therein.

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alone cannot decide this case, however, since Louisiana's unique jurisprudence, a tree with common law branches nourished and supported by civil law roots, often assumes shapes markedly different from any purely civilian species.

In fact, for over a century,[5] the history of Article 2286 was largely one of confusion resulting from the not always compatible contact between two methods of legal thought in Louisiana. Two conflicting but interspersed lines of cases arose, about equal in number, one decided in accordance with the Code and principles of French law, and the other influenced by the common law of other states in which "there were holdings or dicta contrary to the civil law principles of the authority of the thing adjudged." O'Quin, Res Judicata—"Matters Which Might Have Been Pleaded," 2 La.L.Rev. 491, 497 n. 27, 504 n. 56, hereinafter referred to as O'Quin II.

The Louisiana Supreme Court faced this conflict squarely for the first time[6] in Succession of Marinoni, 183 La. 776, 164 So. 797 (1935). *Marinoni* was the plaintiff's second suit to gain possession of a share of her father's estate. In the first suit, she alleged that her mother and Marinoni contracted a legal common law marriage in Mississippi and that she was a legitimate child of that marriage and therefore, a forced heir. The first suit was dismissed for failure to state a claim. In the second suit, the plaintiff claimed a right to her share as the issue of a putative marriage contracted by her mother with Marinoni in good faith and in the belief she was legally married. The supreme court at first upheld the dismissal of the second suit stating that:

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[5] Article 2286 of the Code of 1870 is taken from the earlier Codes of 1825 and 1808.

[6] O'Quin II at 507.

> "The rule is that where one claims a certain thing or seeks recognition of certain rights, he must assert all his pretensions, all his titles, in one suit. A plea of res adjudicata based on a former judgment between the parties on the same subject-matter bars a second suit for the same purpose, not only as to the titles specifically set up in the former suit, but as to those which might have been pleaded as well. A plaintiff cannot withhold grounds for relief which he should have asserted and then, when he loses, file another suit setting forth the facts originally alleged and those withheld." *Marinoni, supra*, at 799-800.

On rehearing, however, the court reversed itself, over three dissents, and specifically cited the above language as "too broadly stated, and . . . not in harmony with the latest decisions of this court on this point." *Marinoni, supra*, at 802. The court, although acknowledging the existence of contrary authority, decided to rely on that line of cases standing for the principles that "The doctrine of the common-law courts that res judicata includes not only everything pleaded in a cause, but even that which might have been pleaded, does not obtain generally under our system," Tennent v. Caffery, 163 La. 976, 990, 113 So. 167, 172 (1927); Woodcock v. Baldwin, 110 La. 270, 275, 34 So. 440, 441 (1902). and that "In this state the doctrine of res judicata is much more restricted than it is in common law states." State v. City of New Orleans, 169 La. 365, 374, 125 So. 273, 276 (1929), citing Woodcock v. Baldwin, *supra*, and State v. American Sugar Refining Co., 108 La. 603, 32 So. 965 (1902).

Applying the principles of Art. 2286, the *Marinoni* court noted that "It requires no great argument to prove that

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one claiming rights under a putative marriage is invoking a different cause of action than one who claims rights under a legal marriage." *Marinoni, supra,* 164 So. at 801.

Five years after *Marinoni*, in Hope v. Madison, 194 La. 337, 193 So. 666 (1940), the court, while reaffirming French principles behind the Louisiana law of *res adjudicata*, attempted to reconcile previous jurisprudence on the subject. The plaintiff, Mrs. Hope, was involved in litigation over real property. While suit was pending, she transferred the mineral rights to the land in question to one of her attorneys of record. In her first suit to set aside the deed of mineral rights, she claimed lack of consideration, misrepresentation and fraud. After losing on the merits, she instituted a second suit to nullify the instrument as a prohibited purchase of a litigious right by an attorney. The issue in the second case, although not pleaded in the first suit, had been argued both in a supplemental brief filed after the case had been argued and submitted to the trial court, and later before the Louisiana Supreme Court. That court dismissed the issue with a statement substantially the same as the one with which the constitutional issues were dismissed in the first Maher case.[7]

In the second *Madison* case, the Louisiana Supreme Court held that *res adjudicata* was not applicable to the case.[8] The court reaffirmed the language of an earlier case which firmly held the Louisiana law of *res adjudicata* bound by the limits of the three unities of parties, object

[7] "Courts can grant no relief for causes not complained of, and for that reason we shall not discuss or decide this point." Hope v. Madison, 192 La. 593, 188 So. 711, 715 (1939).

[8] The dismissal of the case was affirmed, however, on the grounds that the purchase of the litigious right was allowable as a payment for legal services rendered.

and cause (of action) established by the French law. State v. American Sugar Refining Company, 108 La. 603, 32 So. 965 (1902). Moreover, the court after citing the French commentator, Planiol, for the proposition that courts must state precisely what they have decided in order to know what may still be litigated,[9] stressed the point by emphatically adopting the following language from an early Louisiana case:

> "An issue presented by the pleadings in a cause, but eliminated from the judgment of the Court, cannot be invoked in support of the plea of res adjudicata . . . . The issue involving the nullity of Gill's title was tendered by the plaintiff in the rule, who urged the nullity of his purchase of a litigious right under the prohibition of Art. 2447 Civil Code, but the issue was declined by him and, on his objection, *it was specially excluded by us as an issue in the cause. Hence it was not passed upon and therefore it was not a thing adjudged.*" (Italics supplied by the Madison court.) *Madison, supra*, at 669, citing Buck & Beauchamp v. Blair & Buck, 36 La. Ann. 16 (1884).

The court, in *Madison*, briefly reconciled earlier cases with its holding by declaring that

> "A review of the decisions cited by counsel for de-

[9] 2 M. Planiol, Traite Elementaire de Droit Civil No. 54A(3) (11th ed. 1939). The court's translation reads, "In order to have the authority of the thing adjudged respected, the law places at the disposal of parties affected a special exception which is the ancient 'exceptio rei judicatae' of the Romans. *But the law ordains that this exception must not serve to paralyze actions distinct from the first which should remain independent of it, and it ordains them to state precisely in an exact manner that which has actually been judged the first time, in order to know that which may again be litigated.*" (Italics the court's) The Louisiana State Law Institute translation is less cumbersome, but to the same effect, i. e., ". . . what was really decided in the first case should be defined in an exact manner, in order that it may be known what questions may still be adjudicated."

fendant in support of their contention reveals that they are authority only for the following rules: (1) That generally a breach of contract or single tort gives rise to but one cause of action, which cannot be divided and made the subject of several suits, and if one suit is brought for a part of the claim, a judgment thereon may be pleaded in bar to a recovery for another portion of the claim in a second suit (Norton v. Crescent City Ice Manufacturing Company, 178 La. 135, 150 So. 855; P. Olivier & Sons v. Board of Commissioners of Lake Charles, 181 La. 802, 160 So. 419); (2) that in seeking injunctive relief, a litigant must set out all grounds or reasons therefor which existed at the time of his application (McMicken v. Morgan, 9 La.Ann. 208; Trescott v. Lewis, 12 La.Ann. 197; Porter v. Morere, 30 La.Ann. 230; Brooks v. Magee, 126 La. 388, 52 So. 551; Schwartz v. Siekmann, 136 La. 177, 66 So. 770; Givens v. Arcadia Cotton Oil and Mfg. Co., La.App., 175 So. 91); and (3) that parties litigant in a *petitory action*, whether plaintiff or defendant, must set up whatever title or defense they may have at their command or a judgment on that issue will bar a second action based on a right or claim which existed at the time of the first suit, even though omitted therefrom. Gajan v. Patout & Burguieres, 135 La. 156, 65 So. 17; Succession of Whitner, 165 La. 769, 116 So. 180."

After *Madison*, the landmark case on the effect of *res judicata* in Louisiana was Quarles v. Lewis, 226 La. 76, 75 So. 2d 14 (1954). The plaintiff had agreed to sell the defendant a parcel of ground. When the defendant failed to comply with the contract in the specified time period, the plaintiff sued for specific performance, and won.

After defendant complied with the decree, the plaintiff sued again, this time for damages.[10] The Louisiana Supreme Court overruled the exception of *res adjudicata* on the grounds that the things demanded, specific performance and damages, were not the same, and in doing so reaffirmed the principles established in *Marinoni* and *Madison*. The court listed only four exceptions to the principle that there must be an identity of demands, parties and causes of action: 1) suits for partition of real estate; 2) petitory actions; 3) suits for an injunction against the execution of a judgment or of a writ of seizure and sale in executory process; and 4) where the prior litigation was determined on questions of fact and the thing demanded in the second suit is not identical only with relation to time of accrual.

The *Quarles* court noted, however, that some earlier cases which were dismissed by a mistaken application of the common law doctrine of *res judicata* may nevertheless have been correctly disposed of, if for the wrong reason, and was therefore careful to limit its holding to the issue of *res judicata* without comment on the ultimate viability of Mr. Quarles' suit in the face of "an exception of no cause of action or one of judicial estoppel . . . sustained on the theory that [plaintiff] would be considered as waiving all claims for damages which had not been asserted in [his] first suit." *Quarles, supra*, 75 So.2d at 17.

The court cited two cases as examples of its thinking. In Norton v. Crescent City Ice Mfg. Co., 178 La. 150, 150 So. 859 (1933), the court held that a single cause of action in tort was not divisible and that plaintiffs could not

[10] The damages consisted of taxes paid on the property and interest on the purchase price during the period after default on the contract.

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claim their transmitted damages from a deceased parent in one suit and sue for their direct loss resulting from the deaths of their parents in another case. P. Olivier & Sons v. Board of Com'rs, 181 La. 802, 160 So. 419 (1935), stands for the proposition that all breaches of one construction contract constitute but one cause of action.

Both of the examples which *Quarles* classifies as exceptions for "no cause of action" or for "judicial estoppel," it will be noted, are the same cases cited by *Madison* as the first exception to the unities requirement of Art. 2286. It would be difficult, therefore, to read this "judicial estoppel" exception as standing for more than the proposition that a single tort or breach of contract gives rise to only one cause of action. *See, Madison, supra.*[11]

[1, 2] The principles established in *Quarles* remain the law of Louisiana,[12] although disagreements have developed as to the existence of identity of cause and object in specific circumstances, such as a will contest in which both suits allege the invalidity of the same will for an "inexact" date but for different reasons, Succession of Reynolds, 231 La. 410, 91 So.2d 584 (1956), or a concursus proceeding involving the right to oil royalties, California Co. v. Price, La. App., 99 So.2d 743 (1957). *See,* New Orleans Firefighters Assoc. Local 632 v. City of N. O., 263 La. 649, 269 So.2d 194 (1972) especially notes

[11] There is another meaning attached to the term "judicial estoppel" in Louisiana, but it concerns only *issue* preclusion, i. e., "every material allegation or statement made on one side . . . and denied on the other which was determined in the course of the proceedings." California Co. v. Price, 234 La. 338, 99 So.2d 743 (1957). There is some question now whether this Louisiana adaptation of common law collateral estoppel is still viable, Bordelon v. Landry, 278 So.2d 173 (La.App.1973), but in any event it has no application to the case at bar.

[12] *But see,* Quinette v. Delhommes, 165 So. 2d 900 (La.App.1964), which repeats the common law formula in a manner reminiscent of the pre-*Marinoni* cases.

1, 2, 3 at 198-199. *See* also, Bordelon v. Landry, 278 So.2d 173 (La.App.1973).

[3] The case at bar, it seems clear, is not included in any of the exceptions to the strict requirement of the three unities of Art. 2286. It is not a petitory action, nor an action for partition, nor an action to enjoin enforcement of a judgment or executory process.[13] It does not concern a breach of contract or a single tort. Since the Louisiana Supreme Court expressly excluded the constitutional issue in this case from consideration, there can be no question but that this action is founded on a different cause than the earlier *Maher* case, and is therefore not barred from either state or federal court by "the authority of the thing adjudged" under Louisiana law, *Madison*, *supra*.[14]

[4] We can turn now to the merits of the case. To begin with, plaintiff contends that the general regulatory scheme embodied in the Vieux Carre ordinance is not properly within the ample circumference of the police power but can be accomplished only through the exercise of eminent domain with its attendant constitutional requirement of compensation. This argument is clearly without merit. The courts have repeatedly sustained the validity of architectural control ordinances as police power regulation, especially when historic or touristic districts

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[13] Many older Louisiana cases, including *Madison*, contain dicta broad enough to include all injunction suits in this exception. O'Quin pointed out, in 1940, that all of the cases were examples of enjoining the execution of a judgment or executory process. O'Quin II at 512. *Quarles* cleared up any possible confusion as to the scope of this exception.

[14] We see no reason to give more effect to the Louisiana judgment than it would have in the Louisiana courts. *See, generally*, Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich.L.Rev. 1723, 1738-39 (1968). Cf., Gaines v. Hennen, 65 U.S. (24 How.) 553, 16 L.Ed. 770 (1860).

like the Vieux Carre are concerned. Santa Fe v. Gamble, Skogmo, Inc., 73 N.M. 410, 38 P.2d 13 (1964); Town of Deering ex rel. Bittenbender v. Tibbets, 104 N.H. 481, 202 A. 2d 232 (1964); Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963); Opinion of Justices, 103 N.H. 268, 169 A.2d 762 (1961); Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla.1960); State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, cert. den. 350 U.S. 841, 76 S.Ct. 81, 100 L.Ed. 750 (1955); Opinion of the Justices, 333 Mass. 773, 182 N.E. 557 (1955); New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953).[15]

Next, plaintiff maintains that the Vieux Carre ordinance is unconstitutional as applied to his particular cottage. He bases this contention on three arguments: a) that the detriment on the individual landowner in this case outweighs the benefit conferred on the public by the regulation; b) that the application of the ordinance is confiscatory in that it prohibits any economically reasonable use of the property; and c) that the application of the ordinance to the Maher cottage bears no substantial relationship to the regulatory objectives of the ordinance nor, consequently, to the general welfare.

This Court need not do as plaintiff urges and attempt the task of weighing the harm suffered by Maher against the public benefits secured by the preservation of this

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[15] In fact, the trend in the law is in the direction of decreased reliance on commercial, historical and property values to sustain architectural regulation, and toward increased acceptance of the concept of purely aesthetic regulation. *See*, Note, Beyond the Eye of the Beholder: Aesthetics and Objectivity, 71 Mich.L.Rev. 1438 (1973); Comment, Architectural Control Justified on the Basis of Property Value Protection, 1971 Wash.U.L. Q. 118; Comment, Aesthetic Control of Land Use: A House Built Upon the Sand?, 59 Nw.U.L.Rev. 372 (1964); Comment. Zoning Aesthetics, and the First Amendment, 64 Column.L.Rev. 81 (1964).

cottage since we are convinced that this test is not the proper standard of review to apply to this case. This is not a case where a Landmarks Commission has "suddenly and without warning imposed a blanket prohibition against alterations or demolitions upon a single property owner" but is a zoning regulation, of long standing, encompassing a whole district. Trustees of Sailor's Snug Harbor v. Platt, 53 Misc.2d 933, 280 N.Y.S.2d 75, 78 (S.Ct.1967), rev'd on other grounds, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968). *See, also,* Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv.L.Rev. 574, 583 n. 36, 602 n. 93 (1972). *Cf.*, Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557, 562 (1955). A zoning ordinance, as an exercise of the police power, will almost always "reduce the value of rights of some individuals," but that does not make it unconstitutional. Neef v. City of Springfield, 380 Ill. 275, 282, 43 N.E.2d 947, 951 (1942). Such a law becomes confiscatory and thus unconstitutional only when it "goes so far as to preclude the use of the property for any purpose for which it is reasonably adapted." Summers v. City of Glen Cove, 17 N.Y. 2d 307, 270 N.Y.S.2d 611, 217 N.E.2d 663 (1966).

[5] Plaintiff argues that the Vieux Carre ordinance has made his property practically unusable, thereby confiscating it under this test. The Court must disagree. The evidence indicates that although the plaintiff is now receiving only $40.00 per month rental from the cottage, paid by the Maher's maid, no effort has been made to rent the premises out to anyone else for the past eight years. In addition, none except negligible repairs have been done on the property since 1963. The only alternatives which the Mahers have ever considered ot the present arrange-

ment are 1) demolishing the cottage and building apartments or 2) connecting the cottage to the Maher home. No evidence has been presented to indicate why this cottage could not be rented as a single family residence or, with permissible remodeling, as two or more apartments. It is common knowledge, of which the Court takes notice, that the French Quarter is a popular residential area, commanding rents higher than those prevailing in other parts of the city. Furthermore, no evidence has indicated that it might be at all difficult to sell this property. Under these circumstances, plaintiff has wholly failed to carry his burden of proving that he has been deprived of any reasonable use or return from his property.

[6] Plaintiff further challenges the permit denial on the basis of the proposition that if the regulation of a piece of property is found to have no reasonable relation to the purpose of the zoning law, the zoning classification is arbitrary and, hence, unconstitutional as applied. Sturdy Homes, Inc. v. Township of Redford, 30 Mich.App. 53, 186 N.W. 2d 43 (1971); Du Page v. Halkier, 1 Ill.2d 491, 115 N.E.2d 635 (1953). He urges that

> "The cottage in question possesses no historical or architectural value; yet the avowed *purpose of* the Vieux Carre ordinance and its constitutional enabling article is to preserve building of historical and architectural value in order to enhance the economic resources of the City. Accordingly, the Vieux Carre ordinance and the community needs on which it is based have no reasonable relationship to the restriction placed on the Maher property." Pretrial Brief for plaintiff, at 25.

The Vieux Carre ordinance, however, pursuant to its constitutional authorization, authorizes the regulation of *all* buildings in the French Quarter which front on a public street or alley. This power is conferred "for the public welfare in order that the quaint and distinctive character of the Vieux Carre section of the City of New Orleans may not be injuriously affected, and in order that the value to the community of those buildings having architectural and historical worth may not be impaired . . . ." La.Const. Art. XIV, §22A.

An issue similar to this one was faced by the Louisiana Supreme Court in the landmark City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 (1941). In *Pergament*, the owner of a filling station of modern design challenged the power of the ordinance to regulate the type of sign he might erect on his property. The court answered in memorable language.

> "And there is nothing arbitrary or discriminating in forbidding the proprietor of a modern building, as well as the proprietor of one of the ancient landmarks, in the Vieux Carre to display an unusually large sign upon his premises. The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance. The preservation of the Vieux Carre as it was originally is a benefit to the inhabitants of New Orleans generally, not only for the sentimental value of this show place but for

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> its commercial value as well, because it attracts tourists and conventions to the city, and is in fact a justification for the slogan, America's most interesting city." *Pergament, supra,* at 5 So.2d 131.

The same considerations which prevailed in *Pergament* apply to the case at bar. The protection of the "quaint and distinctive character of the Vieux Carre" depends on more than the preservation of those buildings agreed to have great individual artistic or historical worth. Just as important is the preservation and protection of the setting or scene in which those comparatively few gems are situated. In the present case, considerable testimony supported the position that the Maher cottage had substantial architectural value as part of the Vieux Carre scene as well as some individual architectural merit.

The fact that this case concerns the denial of a demolition permit rather than the prohibition of a large sign does not serve to dstinguish *Pergament* in plaintiff's favor. On the contrary, the demolition of a building which contributes to the French Quarter scene is likely to be just as harmful to the *tout ensemble* as the allowance of an overlarge sign. The purpose of the ordinance is as much to preserve existing beauty as to prevent the creation of eyesores.

Plaintiff argues, however, that since he planned to construct a Spanish style building in place of a Victorian cottage not greatly distinguishable from many others in the Quarter, his proposed alteration would contribute more to the Vieux Carre scene than the preservation of the cottage. Such a finding would have certainly been possible. Architects appearing for the plaintiff strongly sup-

ported his position. The fact that the city authorities did not ultimately agree, however, does not make their action arbitrary. There are considerations, consistent with the purpose of the Vieux Carre ordinance, which could cause the city to consider the existing cottage more likely to preserve the "quaint and distinctive character" of the Quarter. Some architects thought that the existing juxtaposition of the cottage with its immediate neighbors created an aesthetically pleasing scene, itself worthy of preservation. In addition, a legitimate consideration of the future as well as the present effects of authorizing demolation of a building which had value as part of the scene, Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275, 244 N.E.2d 311 (1969), could easily lead to the conclusion that the potential effect of such demolition on a larger scale would warrant a refusal to set a precedent. Perhaps even more important, it must be remembered that the Vieux Carre is more than a museum of French and Spanish architectural styles but is a mixture of constructions unique to New Orleans, as well as a living residential and commercial neighborhood containing a lively potpourri of socio-economic and personal lifestyles. In many cases, it could well be a disservice to the "charm and distinctive character" of the Vieux Carre to permit the demolition of existing buildings in order to create new replicas of the past.

[7] Lastly, plaintiff argues that the Vieux Carre ordinance unconstitutionally delegates legislative authority to the City Council and Vieux Carre Commission in that it fails to furnish adequate standards to guide them in making their determinations. Most decisions hold, however, that zoning standards need not be specific but may be broad, general standards "so long as they are capable of

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a reasonable application and are sufficient to limit and define the Board's discretionary powers." City of Santa Fe v. Gamble, Skogmo, Inc., 73 N.M. 410, 389 P.2d 13, 18 (1964), and cases cited therein. In this case, the meaning of a mandate to preserve the character of the Vieux Carre "takes clear meaning from the observable character of the district to which it applies," Town of Deering ex rel. Bittenbender, 105 N.H. 481, 202 A.2d 232 (1964). It is for this reason that the Vieux Carre Commission, realizing that the character and value of many separate buildings and scenes throughout the French Quarter were part of the standard limiting the Commission's discretion, sought out an independent expert study group to evaluate each building in relationship to the whole district. Indeed, it appears that this case has not been an example so much of a lack of standards as a disagreement as to whether the Maher cottage qualified for demolition under the applicable standards. In view of the whole record of this case, it is the opinion of the Court that since the City Council, rather than acting arbitrarily, merely resolved a fair, albeit heated, difference of opinion, the judgment of that zoning authority should be followed. Marquette Nat. Bank v. County of Cook, 24 Ill.2d 497, 182 N.E.2d 147 (1962). *See, also,* City of New Orleans v. Pergament, *supra.* Accordingly,

It is the order of the Court that judgment be entered for the defendants at plaintiff's cost.

**APPENDIX E**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

---

Civil Action No. 71-119 Section "B"

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MORRIS G. MAHER

versus

THE CITY OF NEW ORLEANS, THE DIRECTOR OF THE DEPARTMENT OF SAFETY AND PERMITS OF THE CITY OF NEW ORLEANS, THE VIEUX CARRE COMMISSION and the CITY COUNCIL OF THE CITY OF NEW ORLEANS

JUDGMENT

This cause came on for trial at a former day before the Court, and after hearing testimony of witnesses and argument of counsel, the Court took the matter under submission.

Now, therefore, considering the written reasons of the Court on file and considering the direction of the Court as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants, the City of New Orleans, The Director of the Department of Safety and Permits of the City of New Orleans, the Vieux Carre

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Commission and the City Council of the City of New Orleans and against the plaintiff, Morris G. Maher dismissing said plaintiff's suit with costs.

Dated at New Orleans, Louisiana on this 28th day of February 1974.

.....
United States District Judge

---

Walter M. Barnett, Esq.
Harold B. Carter, Jr., Esq.
Blake Arata, Esq.
Jacob H. Morrison, Esq.
Date of entry March 1, 1974.

## APPENDIX F

## CHAPTER 65

## VIEUX CARRE

## ARTICLE I. IN GENERAL

## ARTICLE II. SIGNS.

## ARTICLE III. PRESERVATION OF EXISTING STRUCTURES AND BUILDINGS.

### ARTICLE I. IN GENERAL.

Section 65-1. Commission established.

There is hereby created a Commission to be known as the Vieux Carre Commission of the city. (C.C.S., Ord. No. 14,538, § 1.)

Section 65-2. Recommendation and appointment of members.

The Vieux Carre Commission shall consist of nine members, all of whom shall be citizens of the city. They shall be appointed by the Mayor with the advice and consent of the Council. The members of the Commission shall be appointed by the Mayor as follows: one from a list of two persons recommended by the Louisiana Historical Society; one from a list of two persons recommended by the Curators of the Louisiana State Museum; one from a list of two persons recommended by the Association of Commerce of the city; three qualified architects from a list of six qualified architects recommended by the New Orleans Chapter of the American Institute of Architects and three at large. (C.C.S., Ord. No. 14,538, §2.)

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Section 65-3. Term; vacancies.

Each of the members of the Vieux Carre Commission shall be appointed for a term of four years. Whenever the term of a member of the Commission expires the Mayor shall appoint his successor from a list selected by the body which made the original selection from which the vacancy has occured. (C.C.S., Ord. No. 14,538, §2.)

Section 65-4. Employees and committees.

The Vieux Carre Commission may select and employ such persons as may be necessary to carry out the purposes for which it is created. The City Attorney shall be ex officio the attorney for the Commission. The Commission may designate and appoint, from among its members, various committees with such powers and duties as the Commission may have and prescribe. (C.C.S., Ord. No. 15,230, §4; C.C.S., Ord. No. 15,303, §2.)

Section 65-5. Rules and regulations; meetings; reports and recommendations.

The Vieux Carre Commission shall make such rules and regulations as it may deem advisable and necessary for the conduct of its affairs not inconsistent with the laws of the city and state. The Commission shall meet at least quarterly, but meetings may be held at any time by the Commission on the written request of any of the nine members or on the call of the Chairman or the Mayor. The Commission shall make quarterly reports to the Mayor and Council containing a statement of its activities. It shall make its recommendations for the future, but recommendations may be made by the Council to the Commission at any time. (C.C.S., Ord. No. 15,230, §4; C.C.S., Ord. No. 15,303, §2)

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Section 65-6. Purpose; definition of Vieux Carre Section.

The Vieux Carre shall have for its purpose the preservation of such buildings in the Vieux Carre section of the city as, in the opinion of the Commission, shall have architectural and historical value and which should be preserved for the benefit of the people of the city and state.

The Vieux Carre Section of the city is hereby defined to comprise all that area within the city limits within the following boundaries: The River, Up-town side of Esplanade Avenue, the River side of Rampart Street and the lower side of Iberville Street. (C.C.S., Ord. No. 14,538, §2.)

Section 65-7. Regulations not applicable in portion of Vieux Carre.

The regulations established by this chapter shall not apply to the following areas:

(1) The River-side lots and buildings on North Rampart Street, from Conti Street to Esplanade Avenue, not to exceed their present depth and in no case to exceed the depth of one-half of the square.

(2) Square No. 96, bounded by Iberville, Rampart, Bienville and Burgundy Streets;

(3) Square No. 97, bounded by Bienville, Rampart, Conti and Burgundy Streets;

(4) The squares contained in the area bounded by Wilkinson Street, the River-side of Decatur Street, from Wilkinson to Iberville Streets, and the Mississippi River; and,

(5) All properties and lots on which same are located, presently occupied by the Monteleone Hotel in Square 35, bounded by Iberville, Royal, Exchange Alley and Bienville Streets. (C.C.S., Ord. No. 16,430, §1.)

Section 65-8. Submission of plans for exterior changes to Commission.

Before the commencement of any work in the erection of any new building or in the alteration or addition to, or painting or repainting or demolishing of any existing building, any portion of which is to front on any public street or alley in the Vieux Carre Section, application by the owner for a permit therefor shall be made to the Vieux Carre Commission, accompanied by the full plans and specifications thereof so far as they relate to the proposed appearance, color, texture of materials and architectural design of the exterior, including the front, sides, rear and roof of such building, alteration or addition or of any out building, party wall, courtyard, fence or other dependency thereof. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085, §1.)

Section 65-9. Commission recommendations and action thereon.

The Vieux Carre Commission shall upon due consideration report thereon promptly its recommendations, including such changes, if any, as in its judgment are reasonably necessary to comply with the requirements of this chapter, by sending them, in writing, to the Director of the Department of Safety and Permits with the application and documents referred to in this article and, if they are found by the Director to comply reasonably with the requirements of this article and if such application and

intended work shall conform also to all other regulations, ordinances and laws of the city, the Director shall issue promptly a permit for such work and indicate on such permit the extent and nature of the work to be performed thereunder. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085, § 1.)

Section 65-10. When Director to submit question to Council; action of Council.

If the applicant for a permit shall refuse to accede to reasonable changes recommended by the Vieux Carre Commission, if the Commission shall disapprove any application or if the Director of the Department of Safety and Permits finds that the recommendations of the Commission do not comply reasonably with the requirements of this article, the Director shall within not later than five days, forward such matters with his written comments to the Council for such action as in its judgment, after notice and affording an opportunity to the applicant and to the Commission and other protesting parties to be heard, shall effect reasonable compliance with such recommendations and this article. (C.C.S., Ord. No. 14,538, §3; C.C.S., Ord. No. 15,085, §1.)

Section 65-11. Private floodlights prohibited.

The public sidewalks, places and alleys, exteriors, roofs, outer walls and fences of buildings and other constructions and signs visible from any public street, place or position in the Vieux Carre Section shall not be illuminated by privately-controlled floodlights or other illumination except as permitted by this chapter. (C.C.S., Ord. No. 15,085, §2.)

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Section 65-12. Existing show cases.

All existing show cases, erected upon public property shall be allowed to remain, be repaired or be duplicated if they do not project farther than eighteen inches beyond the property line.

In the renovation or remodeling of any structure in the Vieux Carre of this City which already has a showcase or showcases on public property, there may be additional showcases similar to those presently existing erected on said property subject to the written approval of the Vieux Carre Commission of the City of New Orleans. (C.C.S., Ord. No. 15,085, §2, M.C.S., Ord. No. 2832, §1, 4-23-64.)

Section 65-13. Overhanging balconies.

No overhanging balconies or galleries of wrought or cast iron may be removed, but other new or additional balconies may be erected if: (a) Supported by brackets or iron columns; (b) at least nine feet above the level of the sidewalk; and, (c) conform to the quaint and distinctive architecture of the Vieux Carre. But permits for all such new construction or any renovation shall be subject to the requirements of this article. (C.C.S., Ord. No. 15,085, §2.)

Section 65-14. Removal of sheds and marquees.

There shall be no restrictions against the removal of sheds supported by wooden columns and such sheds, as well as any marquees, may not be repaired when in dangerous condition, but must be removed. But any change may be made only after first securing a written order or

permit required by this article and may be executed only in accordance herewith. (C.C.S., Ord. No. 15,085, §2.)

Section 65-15. Stopping work commenced without permit.

The Director of the Division of Regulatory Inspections shall promptly stop any work attempted to be done without or contrary to a permit issued under this article and shall promptly prosecute any person responsible for such a violation of this chapter or engaged in such violation. Any officer or authorized agent of the Commission shall exercise concurrent or independent powers with the Director in prosecuting violations of this chapter and stopping any work attempted to be done without or contrary to the permits required by this chapter. (C.C.S., Ord. No. 15,085, §1.)

Section 65-16. Provisions of chapter prevail in case of conflict.

The provisions of this chapter shall govern and take precedence over any other provisions of this Code. (C.C.S., Ord. No. 15,085, §2.)

## ARTICLE II. SIGNS.

Section 65-17. Definitions.

The following terms, as used in this article, are hereby defined as follows:

(a) Sign shall include any symbol, device, image, poster, flag, banner, billboard, design or directional sign used for advertising purposes, whether painted upon, attached to, erected on or otherwise maintained on any premises, containing any words, letters or parts of letters, figures, nu-

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merals, phrases, sentences, emblems, devices, trade names or trade marks by which anything is made known, such as are used to designate an individual, a firm, an association, a corporation, a profession, a business or a commodity or product, which is visible from any public highway and is used to attract attention.

(b) Display includes erect, paint, repaint, place, replace, hang, rehang, repair, maintain, paint directly upon a building or other structure, inlay, imbed in or otherwise exhibit in public view. (C.C.S., Ord. No. 15,085, §2.)

Section 65-18. General prohibition of miscellaneous signs.

The display of signs of a miscellaneous character visible from the public streets, highways and alleys within the Vieux Carre Section of the city, except as otherwise provided in this article, and according to the rules and regulations herein provided for, is prohibited. (C.C.S., Ord. No. 15,085, §2.)

Section 65-19. No signs to be displayed in certain places.

No sign shall be displayed from the parapet or roofs of any buildings along either Decatur Street or French Market Place, both sides, from Esplanade Avenue to Ursuline Street or facing Ursuline Street from Decatur Street to the Mississippi River. (C.C.S., Ord. No. 15,085, §2; C.C.S., Ord. No. 16,096, §1.)

Section 65-20. Signs must conform to character of section.

In addition to the prohibitions contained in this article, approval of the display of a sign in the Vieux Carre Section of the city shall be granted by the Vieux Carre Com-

mission only when such signs and the plans therefor, so far as they relate to the appearance, color, size, position, method of attachment, texture of materials and design, conform to the quaint and distinctive character of the Section or do not injuriously affect it or impair the value to the community of those buildings having architectural or historical worth. (C.C.S., Ord. No. 15,085, §2.)

Section 65-21. Permit required for signs in certain area; exceptions.

In that part of the Vieux Carre Section of the city comprised within the following boundaries: Beginning at and including the upper side of Esplanade Avenue and the lake side of Decatur Street and proceeding thence, but not including the lake side of Decatur Street to the lower side of Ursuline Street; thence along the lower side of Ursuline Street to the Mississippi River, thence along the Mississippi River to the lower side of Wilkinson Street; thence along, but not including, the lower side of Wilkinson Street to the lake side of Decatur Street; thence along, but not including, the lake side of Decatur Street to the lower side of Iberville Street; thence along, but not including, the lower side of Iberville Street to the river side of North Rampart Street; thence along, but not including, the river side of North Rampart Street to the upper side of Esplanade Avenue; thence along and including the upper side of Esplanade Avenue to the Mississippi River; no sign shall be displayed unless a permit therefor shall first have been applied for to the Vieux Carre Commission and issued in accordance with section 65-9, but no permit shall be required in case of a theatre or commercial establishment changing the bill of its acts and features or the nature of its commodities and wares and the prices thereof

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on established and approved frames. Existing hotels having a room capacity of fifty rooms or over and all existing theatres housed in buildings having no architectural or historic value shall be allowed to maintain such displays as are permitted by law to establishments of this nature in other sections of the city. (C.C.S., Ord. No. 15,085, §2; C.C.S., Ord. No. 16,096, §1.)

Section 65-22. What signs may advertise.

No sign of any character shall be displayed in the Vieux Carre unless such sign advertises a bona fide business conducted in or on the premises and, if it does do so, not exceeding fifty per cent of the area of such sign may be used to advertise products or commodities actually sold on the premises. (C.C.S., Ord. No. 15,085, §2.)

Section 65-23. Signs no longer complying as to advertisements to be taken down.

Any sign displayed which no longer advertises a bona fide business conducted upon the premises shall, upon notification by the Vieux Carre Commission or its agent (who is hereby specifically authorized to so proceed), be taken down, removed or obliterated within five days after such notification and failure so to comply on the part of the owner, occupant, agent or person having the beneficial use of any building or premises upon which such sign may be found shall subject such person to the penalty provided in section 1-6. (C.C.S., Ord. No. 15,085, §2.)

Section 65-24. Only one sign per shop, etc.

One sign only shall be allowed to each store, shop or bona fide place of business, and this sign shall be no larger than the maximum stipulated in this article, regardless

of the amount of front footage. (C.C.S., Ord. No. 15,085, §2.)

Section 65-25. Signs not to be placed on balcony, fence, etc.

No sign shall be placed upon a balcony, gallery, canopy, shed, roof, door or window or placed in any manner whatsoever so as to disfigure or conceal any architectural feature or detail of any building. No sign shall be displayed from any fence, wall or open lot unless it conforms in proportion to the allowable area and does not exceed the maximum. (C.C.S., Ord. No. 15,085, §2.)

Section 65-26. Length of permitted projection of signs.

No sign shall project more than forty-eight inches beyond the building line, except that, for the purpose of illumination, a hood may be used with not to exceed six inches additional projection. (C.C.S., Ord. No. 15,085, §2.)

Section 65-27. Surface area of signs.

The surface area of any sign shall be in direct proportion to the amount of front footage of each ownership and shall be as follows:

(1) For single-faced signs, attached flat against the wall and including painted wall signs there shall be allowed thirty square inches of sign surface are to each foot of lot frontage.

(2) For double-faced signs, suspended by brackets or arms perpendicularly from the wall of a building there shall be allowed sixty square inches of sign surface area to each running foot of lot frontage. The area of such a

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double-faced sign shall be taken to mean the sum of the areas of each face.

(3) In no case shall the area of any one single-faced or painted wall sign exceed eight square feet, the maximum allowable size for such a sign.

(4) In no case shall the area of any one single-faced or painted wall sign be less than two square feet, unless by special permission of the Vieux Carre Commission.

(5) In no case shall the area of any one double-faced sign exceed a total for both sides of sixteen square feet, the maximum allowable size for such sign.

(6) In no case shall the area of any one double-faced sign be less than four square feet, unless by special permission of the Commission.

(7) In the case where two or more businesses are conducted on the premises of single ownership having a front footage of twenty-five feet or less, the allowable sign area shall be increased by one and a half times. (C.C.S., Ord. No. 15,085, §2.)

Section 65-28. Illuminated signs generally.

In the case of illuminated signs, where space must be provided between two parallel faces for the installation of lighting fixtures, these faces shall not be farther apart than eighteen inches and such lighting fixtures and all light sources shall be a steady light concealed: (a) Behind standard opal glass or other substance of equal or smaller light transmission factor; (b) by hoods; or, (c) by any acceptable method of indirect lighting approved by the Vieux Carre Commission. (C.C.S., Ord. No. 15,085, §2.)

Section 65-29. Wattage regulations for illuminated signs.

Illuminated signs must conform to the following regulations as to wattage, so as to avoid concentration of illumination:

(1) In a sign of the size eighteen by forty-two inches it must not have over one hundred and fifty watt total for each sign, distributed evenly over the surface area of any one side or of each of the two sides of the sign, behind opal glass, and the same wattage maximum and even light distribution is required in an indirectly lighted sign;

(2) In a sign of the size twenty-four by forty-eight inches it must not have over two hundred and twenty watt total for each sign, distributed evenly over the surface area of any one side or each of the two sides of the sign, behind opal glass, and the same wattage maximum and even light distribution is required in an indirectly lighted sign; and,

(3) In signs smaller than eighteen by forty-two inches it must not use more than seventy-five watts distributed evenly over the surface area of any one side or each of the two sides of the sign; but in no case can such smaller signs with an upper allowable limit of seventy-five watts concentrate the emitted illumination through a smaller area on each side than one foot square, using opal glass over all light openings and the same wattage maximum and even light distribution must be observed in an indirectly lighted sign. (C.C.S., Ord. No. 15,085, §2.)

Section 65-30. Building Code applicable to signs.

All signs under this article shall be further governed by the existing regulations of the Building Code of the city

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which are not in conflict with this article. (C.C.S., Ord. No. 15,085, §2.)

Section 65-31. Applications for signs to be submitted to Commission.

All applications for permits to display signs within the Vieux Carre Section of the city shall be submitted to the Vieux Carre Commission for approval before a permit therefor may be issued in conformity with section 65-9. (C.C.S., Ord. No. 15,085, §2.)

Section 65-32. Form of application to display signs; accompanying drawings.

Application for a permit to display signs in the Vieux Carre Section of the city shall be made to the Commission upon forms furnished by the Commission. Such an application shall also be accompanied by sketches and drawings in triplicate showing details of construction and foundation when required by the Building Code of the city and shall delineate the size, shape, design, coloring, lighting and position in relation to the building from or upon which it shall be displayed. (C.C.S., Ord. No. 15,085, §2.)

Section 65-33. Violating signs, etc., to be removed.

Any sign or exterior illumination of walls, exteriors, roofs or appurtenances of buildings displayed contrary to the provision of this article shall be removed. (C.C.S., Ord. No. 15,085, §2.)

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## ARTICLE III. PRESERVATION OF EXISTING STRUCTURES AND BUILDINGS.

Setcion 65-36. Preservation of existing structures by owner or person having legal custody thereof.

All buildings and structures in that section of the city known as the Vieux Carre Section and so defined generally in section 65-6, section 65-7, under the jurisdiction of the Vieux Carre Commission, as provided by Article 14 of Section 22A of the Louisiana Constitution, shall be preserved against decay and deterioration and free from certain structural defects in the following manner, by the owner thereof or such other person or persons who may have the legal custody and control thereof. The owner or other person having legal custody and control thereof shall repair such building if it is found to have any of the following defects:

(a) Those which have parts thereof which are so attached that they may fall and injure members of the public or property.

(b) Deteriorated or inadequate foundation.

(c) Defective or deteriorated flooring or floor supports or flooring or floor supports of insufficient size to carry imposed loads with safety.

(d) Members of walls, partitions or other vertical supports that split, lean, list or buckle due to defective material or deterioration.

(e) Members of walls, partitions or other vertical sup-

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ports that are of insufficient size to carry imposed loads with safety.

(f) Members of ceilings, roofs, ceiling and roof supports or other horizontal members that are of insufficient size to carry imposed loads with safety.

(h) Fireplaces or chimneys which list, bulge or settle due to defective material or deterioration.

(i) Fireplaces or chimneys which are of insufficient size or strength to carry imposed loads with safety.

(j) Deteriorated, crumbling or loose plaster.

(k) Deteriorated or ineffective waterproofing of exterior walls, roofs, foundations or floors, including broken windows or doors.

(l) Defective or lack of weather protection for exterior wall coverings, including lack of paint, or weathering due to lack of paint or other protective covering.

(m) Any fault or defect in the building which renders the same structurally unsafe or not properly watertight. (M.C.S., Ord. No. 1354, §1, 5-15-58.)

Section 65-37. Failure to correct defects after knowledge thereof.

Failure of the owner, or the other proper person having legal custody of the structure or building to correct the defects as outlined in section 65-36 after knowledge of the existence of such defects has been brought to their attention, shall constitute a violation of this article and shall

be punishable as provided in section 1-6. (M.C.S., Ord. No. 1354, §1, 5-15-58.)

Section 65-38. Department of Safety and Permits to aid Vieux Carre Commission in enforcement of article; powers and duties of inspectors.

Upon request, the Department of Safety and Permits shall aid the Vieux Carre Commission in making all necessary inspections in connection with the enforcement of this article, and furnish the Vieux Carre Commission with copies of the reports of their inspections to aid in such enforcement. Employees of the Department of Safety and Permits shall have the same right to inspect premises in connection with the enforcement of this article as they now have in relation to zoning and other violations under the jurisdiction of such department. (M.C.S., Ord. No. 1354, §1, 5-15-58.)

Section 65-39. Duty of Vieux Carre Commission to assist in enforcement of article.

It shall be the duty of the Vieux Carre Commission, through its Director or other proper officer, to send notices to all persons who may be guilty of a violation of this article and inform them of defects in their buildings or structures which must be remedied, in compliance with this article. If such notice has not been complied with after thirty days shall elapse from the giving of such notice, then it shall be the duty of the Director of the Vieux Carre Commission to prosecute or to cause to have prosecuted such violations of this article in the Municipal Courts of the city, or such other court of competent jurisdiction as may be proper, either civil or criminal. This duty shall not be mandatory where the Director believes or

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has good reason to believe that the person to whom notice has been sent is complying or attempting to comply with the provisions of this article. (M.C.S., Ord. No. 1354, §1, 5-15-58.)

Section 65-40. Construction with existing laws.

This article shall not be construed to repeal the provisions of any existing laws and ordinances establishing building and zoning requirements for the city generally or any other section of this chapter, except such as may directly conflict herewith. (M.C.S., Ord. No. 1354, §1, 5-15-58.)

## APPENDIX G

Art. 14, §22A. Vieux Carre Commission

Section 22A. Creation; membership. The Commission Council of the City of New Orleans is hereby authorized to create and organize a Commission to be known as the Vieux Carre Commission, to be appointed by the Mayor of said City with the advice and consent of its Commission Council and to be composed of nine members, all of whom shall be citizens of the City of New Orleans. The members of said Commission shall be appointed by the Mayor as follows: One from a list of two persons recommended by the Louisiana Historical Society; one from a list of two persons recommended by the Curators of the Louisiana State Museum; one from a list of two persons recommended by the Association of Commerce of the City of New Orleans; three qualified architects from a list of six qualified architects recommended by the New Orleans Chapter of the American Institute of Architects; and three to be appointed at large. Whenever the term of a member of said Commission appointed from such lists expires or a vacancy otherwise occurs, the Mayor shall appoint his successor for the unexpired term from a list selected by the body which made the original selection as aforesaid. Each of the members of said Commission shall be appointed for a term of four years and shall serve without a compensation. Members shall continue to hold office until their successors have been appointed and qualified.

Purpose. The said Commission shall have for its purpose the preservation of such buildings in the Vieux Carre section of the City of New Orleans as, in the opinion of said Commission, shall be deemed to have architectural

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and historical value, and which buildings should be preserved for the benefit of the people of the City of New Orleans and the State of Louisiana, and to that end the Commission shall be given such powers and duties as the Commission Council of the City of New Orleans shall deem fit and necessary.

Vieux Carre section defined. The Vieux Carre Section of the City of New Orleans is hereby defined to comprise all that area within the City Limits of the City of New Orleans contained within the following boundaries: The River, Uptown side of Esplanade Avenue, the River side of Rampart Street, and the lower side of Iberville Street.

Buildings; tax exemption; preservation. The Commission Council of the City of New Orleans is authorized to exempt such buildings and other structures, as may be designated by the said Vieux Carre Commission as having historical and architectural value, from municipal and parochial taxation for such period of years as said Commission Council may determine; provided, that the owners of the said buildings and structures, for themselves, their heirs and assigns, shall agree by formal contract, with the said Commission and the City of New Orleans, that the said buildings or other structures shall never be altered or demolished without the approval of the Vieux Carre Commission.

Buildings; acquisition. The preservation of the buildings in the Vieux Carre section of New Orleans having architectural and historical value is hereby declared to be a public purpose and the City of New Orleans is hereby authorized to acquire by purchase or expropriation or otherwise, such buildings and other structures in that section

of the City of New Orleans, as the said Vieux Carre Commission may recommend to the Commission Council.

Duties of commission. Hereafter and for the public welfare in order that the quaint and distinctive character of the Vieux Carre section of the City of New Orleans may not be injuriously affected, and in order that the value to the community of those buildings having architectural and historical worth may not be impaired, and in order that a reasonable degree of control may be exercised over the architecture of private and semi-public buildings erected on or abutting the public streets of said Vieux Carre section, whenever any application is made for a permit for the erection of any new building or whenever any application is made for a permit for alterations or additions to any existing building, any portion of which is to front on any public street in the Vieux Carre section, the plans therefor, so far as they relate to the appearance, color, texture of materials and architectural design of the exterior thereof shall be submitted, by the owner, to the Vieux Carre Commission and the said Commission shall report promptly to the Commission Council its recommendations, including such changes, if any, as in its judgment are necessary, and the said Commission Council shall take such action as shall, in its judgment, effect reasonable compliance with such recommendations, or to prevent any violation thereof.

The Commission Council of the City of New Orleans may, by ordinance or otherwise, carry the above and foregoing provisions into effect. (Added Acts 1936, No. 139, adopted Nov. 3, 1936.)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1175

PAULA BETH LASHLEY MAHER, Administratrix of the Succession of Morris G. Maher,

Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, ET AL.,

Respondents.

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT


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BLEED THROUGH

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THE CITY OF NEW ORLEANS, ET AL.,

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# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

MAY IT PLEASE THE COURT:

Mrs. Paula Maher petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit upholding the constitutionality of the ordinances of the City of New Orleans regulating the architectural features of the exterior of the buildings located in the Vieux Carre. These ordinances, which have now been in effect for forty (40) years, regulate that area of the City of New Orleans nationally referred to as the French Quarter.

## STATEMENT OF THE CASE

Mr. Maher's statement of the case is substantially correct, however, the factual background of this litigation is much more intricate than set forth in his Petition For Writ of Certiorari.

The facts are more fully set forth in Judge Heebe's (Petition For Writ, A-37 thru A-41) opinion and are as follows:

> Mr. Maher, until his recent death, resided at 810 Dumaine. The property at 818-820 Dumaine, a Victorian cottage next door to the residence, is the subject of over ten years of arduous and determined legal struggle.
>
> In March of 1963, Mr. Maher applied to the Vieux Carre Commission for authority to demolish the cottage and replace it with an addition to his home. The addition would have included seven rent-producing apartments.
>
> Although the Architectural Committee of the Commission had approved the construction plans, the Vieux Carre Commission disapproved the application to demolish on April 16, 1963. A number of property owners, the Vieux Carre Property Owners and Associates, Inc., the French Quarter Residents Association and the Lousiana Council for the Vieux Carre had strenuously opposed demolition.
>
> On June 18, 1963, after considering a letter from Mr. Maher's architect, the Commission voted to obtain a report from the Vieux Carre Survey Advisory Committee. The committee was in the process of making an architectural analysis for the entire French Quarter through the use of a survey conducted by the Schleider Foundation in connection with Tulane University. That report classified the cottage as "worthy of preservation as part of the scene."



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On September 17, 1963, the Vieux Carre Commission again disapproved of the application to demolish.

On October 31, 1963, Mr. Maher again applied to the Commission. On December 17, 1963, the Commission, meeting in a closed session, overruled its two previous decisions and granted the application to demolish.

On February 13, 1964, a group of property owners, acting under the name of the Vieux Carre Property Owners and Associates, Inc., appealed the decision of the Vieux Carre Commission to the City Council. The Council, after a hearing, resolved that the cottage had architectural or historical value, overruled the decision of the Commission and ordered the Director of the Department of Safety and Permits of the City of New Orleans not to issue a demolition permit to Mr. Maher.

On July 23, 1964, Mr. Maher filed suit in Civil District Court for Orleans Parish asking that the decision of the City Council be held null and void. At this time, it was agreed by all parties to the suit that the action of the Council was indeed void since the Council had considered the matter before Mr. Maher had requested a permit from the City Department of Safety and Permits to demolish the cottage. Mr. Maher applied to the Department for his permit but was refused. He then appealed to the City Council for a reversal of the action of the Department.

On August 16, 1966, after a hearing, the Council reaffirmed its previous ruling and overruled the Vieux Carre Commission's grant of the demolition permit.

The suit in Civil District Court was resumed, and on December 7, 1967, was tried. On February 26, 1968, Judge Garvey, without written reasons, rendered judgment "as prayed" in

favor of the plaintiff.

On appeal, the Louisiana Court of Appeal for the Fourth Circuit reversed the trial court and dismissed the suit. The Court, in an opinion reported at 222 So. 2d 608 (La. App. 1969), held that the action of the City Council was proper and that the Vieux Carre Ordinance was constitutional both on its face and as applied in Mr. Maher's case.

Mr. Maher applied to the Louisiana Supreme Court for writs of review. These were granted, and the Court affirmed the judgment of the Court of Appeal denying the demolition permit. In its opinion, the Court held that the actions of the City Council were proper under Louisiana law but declined to consider any attack on the constitutionality of the ordinance since "no plea attacking its constitutionality for any reason was filed in the district court. * * * Consequently (constitutional issues) cannot be considered by us now." Maher v. City of New Orleans, 256 La. 131, 235 So. 2d 402, 405 (1970). In a foot note, the Court observed that:

> "Apparently without realizing that the constitutional issue had not pleaded (sic) in the trial court the Court of Appeal did pass on the constitutional question set out in assignment of error "B" and held that our decision (sic) in City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 and City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 in which we maintained the validity of the ordinance had set at rest the question of whether or not the ordinance was subject to attack because it was too vague and indefinite. We are inclined to agree." 235 So. 2d at 405, fn. 3.

In passing, the Court noted that it was completely satisfied that "the Maher cottage composed part of the elusive 'tout ensemble' of the Vieux Carre as described by this Court . . .



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and that it does have architectural value."

On January 14, 1971, Mr. Maher filed suit in this Court seeking a declaration of the unconstitutionality of the Vieux Carre ordinance and an injunction against its enforcement. He, and now his estate, have challenged the constitutionality of the ordinance, both on its face and as applied.

Judge Heebe, in denying Maher's petition, found that the Vieux Carre Ordinances (which are cited at length in the Petition For Writ of Certiorari on A-60 thru A-75) met all of the Constitutional tests.

Judge Heebe's decision was upheld in the United States Court of Appeals, Fifth Circuit. Judge Adams, writing for the Court, concluded:

The Vieux Carre Ordinance was enacted to pursue the legitimate state goal of preserving the "tout ensemble" of the historic French Quarter. The provisions of the Ordinance appear to constitute permissible means adapted to secure that end. Furthermore, the operations of the Vieux Carre Commission satisfy due process standards in that they provide reasonable legislative and practical guidance to, and control over, administrative decision making.

Once the district court concluded it was at liberty, under principles of finality, to reach the merits of Maher's case, that court was not persuaded that the denial of a demolition permit was arbitrary. It did not find that the ordinance as applied to Maher constituted a taking of Maher's property for which compensation was indicated. These determinations, based on the proof proffered there, are not clearly erroneous.

An order will, therefore, be entered affirming the judgment of the district court.

The questions presented for review are the same as those that were rejected by the District and Appellate Court, i.e. (Point I) is the Ordinance as applied to Maher, a permissible exercise of the Police Power; and (Point II) does the Ordinance contain sufficient guidelines to comply with the due process clause of the United States Constitution?

## REASONS FOR DENYING THE WRIT

### POINT I

Maher argues that the Court of Appeals held:

> ". . . that once the City ordered Maher to preserve his building, Maher must prove:
>
> ". . . that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return or that other potential use of the property was foreclosed . . . "
> (Page 29A, infra)

The final sentence to the paragraph quoted above is:

> "to the extent that such is the *theory underlying Maher's claim*, it fails for lack of proof."

The Court of Appeals did not hold that these *were* the *only* guidelines in determining whether or not a taking had taken place. It merely held that Maher failed to submit adequate proof to satisfy his *own theory* of what constitutes a taking.

Immediately preceeding the language quoted by Maher (A-29 Petition For Writ) the Court holds:



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"As the ordinance was applied to Maher, the denial of the permit to demolish and rebuild does not operate as a classic example of eminent domain, namely, a taking of Maher's property for government use. Nor did Maher demonstrate to the satisfaction of the district court that a taking occurred because the ordinance so diminished the property value as to leave Maher, in effect, nothing."

This, we suggest, is the true test of what constitutes a taking. Did the application of the ordinance, insofar as the Maher cottage is concerned so diminish the value of the property as to leave Maher, in effect, nothing? This question must be answered negatively.

The City of New Orleans is not physically taking the Maher cottage. Mr. Maher's estate still owns it and can use it for the same purpose that it was originally constructed for. It can be utilized as a single family dwelling or developed into an apartment complex. The public cannot use it in anyway save the exception of viewing the street facade.

Most importantly is the added fact that Maher is not asked or required to do anything more or less than his neighbors that occupy the one hundred (100) square blocks that comprise the Vieux Carre.

Maher has cited and relied to considerable extent on the decision of Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922), *United States v. Dickinson*, 331 U.S. 745, 67 Sup. Ct. 1382, 91 L. Ed. 1789 (1947), *Martin v. District of Columbia*, 205 U.S. 135, 27 S. Ct. 441 (1907) and *Block v. Hirsh*, 256 U.S. 135, 41 S. Ct. 458 (1921). These are truly broken reeds on which to lean and involve facts far afield from those in the case at bar.

Mahon was a suit arising out of a threat to a house due to

subsidence caused by mining. Maher has quoted briefly from this case in his brief, however, we have no fear whatever in quoting the real and actual basis upon which the decision turned:

> "Government hardly could go on if to some extent values incident to property could not be diminished *without paying* for every such change in the general law. *As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.* But obviously this implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."
> (Emphasis supplied).

The *Mahon* case has been the subject of several law review articles, particularly one in 74 *Yale Law Journal* 36 where the author quotes from Holmes and says that:

> Where the exercise of the police power makes the affected property "wholly useless, the right of property would prevail over the other public interest and the police power would fail". The author then cites other cases by Holmes to the effect that the police power would prevail where the "taking" was "comparatively insignificant" or the loss was relatively small.

From 44 *So. Cal. Law Review* 37, we excerpt this pithy summation on Mahon:

> "Holmes, however, recognized that even a very substantial private property loss could be justified by overriding public interest. See e.g. Erie R.R. v. Public Utilities



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Comm'rs. 254 U.S. 394, 400 (1921)".

*United States v. Dickinson*, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947) involved the obtaining of easements by the government, without condemnation proceedings, in connection with damming a river. The water rose and flooded Dickinson's land. The Court very properly held that the landowner was entitled to compensation for the full value as of the time of flooding.

*Martin v. District of Columbia*, 205 U.S. 135, 27 S. Ct. 441 (1907) related to apportioning the cost of widening an alley. The Court held that the cost must be allocated according to the benefit to each lot.

*Block v. Hirsh*, 256 U.S. 135, 41 S. Ct. 458 (1921) was a suit for possession of a cellar which was resisted as the tenant claimed the right to hold over under a World War I law. The Court upheld the constitutionality of this temporary wartime measure, though it was a close question and four judges dissented.

We might summarize the above cases by saying that none of them involved zoning or regulatory laws such as the Vieux Carre Ordinance; and we have no quarrel with the holdings of the Courts in all of these cases.

In his original brief, Maher relied heavily on *Trustees of Sailors Snug Harbor v. Platt*, 280 N.Y.S. 2d 75 and 288 N.Y.S. 2d 314; and *Keystone Associates v. Mordler*, 278 N.Y.S. 2d 185, 243, both of which are cases involving the New York Landmarks Code.

Sailors Snug Harbor is conspicuously absent from the brief in support of the application for writs and Keystone Associates has been relegated to a mere footnote. The reason for this is

the recent New York Appellate Court decision (December 16, 1975) in *Penn Central Transportation Company v. The Landmarks Preservation Commission of the City of New York*, 377 N.Y.S. 2d 20. In this decision New York turned the corner and joined the rest of the nation in the field of preservation.

Justice Murphy, speaking for the Court stated:

> In recent years, as we have become painfully aware that "the frontier" has been disappearing and our natural resources are rapidly being depicted, there has been an increasing national growth of interest in preserving irreplaceable buildings and sites which have historical, aesthetic or cultural significance.

In commenting on the "taking issue," the Court concluded:

> The sole question to be decided, then, is whether plaintiffs have satisfactorily established that the law, as applied to them in this case, imposes such a burden as to constitute a compensable taking. Put another way, while the exercise of the police power to regulate the private use of property is not unlimited, it is for the one attacking such regulation in any given case to establish that the line separating valid regulation from confiscation has been breached.

Since 1941, the Louisiana appellate courts have upheld the constitutionality of the Vieux Carre Ordinance without exception. *City of New Orleans v. Impastato*, 3 So. 2d 559; *City of New Orleans v. Levy*, 64 So. 2d 798; *City of New Orleans v. Pergament*, 5 So. 2d 129; *Vieux Carre Propery Owners and Associates v. City of New Orleans*, 167 So. 2d 367; *Maher v. City of New Orleans*, 222 So. 2d 608 and 235 So. 2d 402. In *City of New Orleans v. Pergament*, supra, from which the trial judge quoted in his opinion, the Louisiana Supreme Court used the following emphatic language on this subject:



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"The ordinance might be deemed violative of the equal protection clause in the Fourteenth Amendment if the ordinance undertook to confer upon the Vieux Carre Commission the authority to grant or withhold permits arbitrarily, *or without prescribing uniform requirements or standards* which all persons similarly situated should be obliged to comply with. *But the ordinance does prescribe such uniform requirements or standards.* And there is nothing arbitrary or discriminating in forbidding the proprietor of a modern building, as well as the proprietor of one of the ancient landmarks, in the Vieux Carre to display an unusually large sign upon his premises. The purpose of the ordinance is *not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble,* so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance. The preservation of the Vieux Carre as it was originally is a benefit to the inhabitants of New Orleans generally, not only for the sentimental value of this show place but for its commercial value as well, because it attracts tourists and conventions to the city, and is in fact a justification for the slogan, America's most interesting city." (Emphasis supplied)

Accordingly, it is submitted that the Fifth Circuit Court of Appeals correctly concluded that the Vieux Carre Ordinance was enacted to pursue the legitimate State goal of preserving the "tout ensemble" of the historic French Quarter and that the provisions thereof constitutes permissible means adapted to secure that end.

## POINT II

Not all governmental regulation of a citizen's affairs is entitled to constitutional scrutiny. It serves us well to observe that the third inalienable right enunciated by our founding fathers was "the pursuit of happiness," not "property" or "private property", as well it could have been. The Bill of Rights proscribes safeguards respecting "life" and "liberty", but its only enshrinement of private property is found in the prohibitions against deprivation without due process and taking for public use, without just compensation, as found in the Fifth Amendment. Quite simply, our founding fathers never intended nor did they provide for the right to unlimited "use" of private property when that use runs contrary to reasonable regulations arising from established public policy. *Berman v. Parker*, 348 U.S. 26 (1954).

If this court resolves the "taking" and "deprivation" issue in favor of the respondents, as briefed hereinabove, then the only remaining right on which the petitioner relies is "use;" and that right has never received the "void for vagueness" scrutiny accorded the provisions of the Bill of Rights. *Palko v. Connecticut*, 302 U.S. 319 (1937). In refusing a challenge by a property owner to the constitutionality of a Long Island zoning ordinance that limited rental of an apartment to a family, necessarily excluding unrelated college students, this Court recently held that no "fundamental" constitutional right was involved. *Village of Bell Terre v. Boraas*, 416 U.S. 1, at page 7 (1974).

Professor Anthony G. Amsterdam's well recognized treatise on vagueness concludes in part as follows:

> "Vagueness analysis represents methodology on several levels. Functionally it is a means for securing the Court's Control over the methods by which governmental compulsion may be brought to bear on the individual. In this



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aspect, it involves an appraisal of the states' methodology from the perspective of probable regularity of operation in the light, in any given case, both of the subject matter's inherent amenability to regulation by articulate uniform rule, and of the seriousness of what is at stake if regulation if left non-uniform and happens to work erratically."

*The Void-for-Vagueness Doctrine in the Supreme Court* 109 V. Pa. L. Rev. 1 (1960).

If the unlimited use of private property is not a fundamental constitutional right, it follows that the requirement of seriousness of the matter at stake is not present. Moreover, the petitioner accepts the goal of historic preservation generally as a worthy cause, but challenges the method by which preservation limitations are imposed on her. That calls to question the inherent amenability of this laudable purpose to the guidelines that plaintiff demands. The overwhelming majority of other jurisdictions that have adopted historic preservation laws, have done so without any of the guidelines that are demanded by the petitioner here. If petitioner demands guidelines, then it should be her burden to prove that this matter is susceptible of guidelines and to offer some such guidelines, at least by way of example. This burden has never been carried by the petitioner. The ordinance is entitled to the presumption of constitutionality, and that presumption has never been rebutted.

Assuming arguendo that the void-for-vagueness doctrine is applicable, we respectfully submit that adequate guidelines do exist. We quote from the Court of Appeals, as follows:

"While concerns of aesthetic or historical preservation do not admit to precise quantification, certain firm steps have been undertaken here to assure that the Commission would not be adrift to act without standards in an impermissible fashion. First, the Louisiana Constitution, the

Vieux Carre Ordinance and, by interpretation, the Supreme Court of Louisiana, have specified their expectations for the Vieux Carre, and the values to be implemented by the legislation."

"Further, the legislature exercies substantial control over the Commission's decision making in several ways. Where possible, the ordinance is precise, as for example in delineating the district, defining what alterations in which locations require approval, and particularly regulating items of special interest such as floodlights, overhanging balconies or signs.

Another method by which the lawmaking body curbed the possibility for abuse by the Commission was by specifying the composition of that body and its manner of selection. Thus, the City is assured that the Commission includes architects, historians and business persons offering complementary skills, experience and interests.

The elaborate decision making and appeal process set forth in the ordinance creates another structural check on any potential for arbitrariness that might exist. Decisions of the Commission may be reviewed ultimately by the City Council itself. Indeed, that is the precedure that was followed in the present case."

*Maher v. The City of New Orleans, et al*
516 F. 2d 1051, 1062 (1975)

We contend that this ordinance, taken as a whole, provides fair warning or notice to a property owner who comes within its reach. See *Smith v. Goguen*, 415 U.S. 566 (1974). The Commission's authority is limited to the modification, construction and demolition of buildings within a limited area. Both the authority and the operative principle by which it is applied are



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more clearly defined and limited than the redevelopment authority that was sustained by this Court in *Berman v. Parker*, supra. The penal provisions of the ordinance in question do not begin to operate until a specific defect as enumerated in the ordinance has been called to the property owner's attention.

Of the four cases cited by petitioner for the proposition that "void for vagueness" has application in civil matters, three are patently and obviously criminal and immigration cases. The only case cited by petitioner that actually applies void for vagueness to civil matters is *Small v. American Sugar Refining Company*, 267 U.S. 233 (1925). In that case, plaintiff sought to enforce a contract and defendant pleaded in defense a criminal statute that had been declared invalid as vague. The Court said that if it was invalid for criminal conduct it was not available as a defense in a civil action. But in so doing, the Court enunciated a vagueness test for civil matters: "so vague and indefinite as to be no rule at all." Ibid at 239.

In conclusion, we submit that the void-for-vagueness analysis is inapplicable to petitioner's claim; and in the alternative, that the ordinance provides sufficient standards to pass constitutional muster.

## CONCLUSION

The American people are now cognizant of the significance of such things as their environment, the ecology and their historic heritage. The worthy objectives of historic preservation cannot be obtained without some modicum of sacrifice and dedication on the part of all the people.

As set forth in Pergament (supra), "the purpose of the Vieux Carre Ordinance is not only to preserve the old buildings themselves, but to preserve the whole French and Spanish Quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism." This is a legitimate state goal and, as applied to Maher, it does not constitute a taking within the meaning and intention of the Fifth Amendment of the United States Constitution.

The Vieux Carre Ordinance, taken as a whole, provides fair warning or notice to property owners who come within its reach. The Ordinance further provides adequate legislative direction to the Commission to enable it to perform its functions within the due process clause.

We ask that the writ be denied.

Respectfully submitted,

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New Orleans, Louisiana 70112

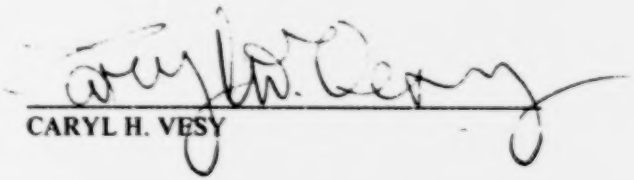
BY:_____
JAMES G. DERBES

## CERTIFICATE

It is certified in accordance with Supreme Court Rules 21 and 33, that three copies of the foregoing petition for certiorari have been served on each of the individuals named below, by depositing same in a United States mail box, first class postage prepaid, or, if applicable, air mail postage prepaid, addressed as follows:

Harold B. Carter, Jr. and Walter M. Barnett
Montgomery, Barnett, Brown and Read
806 First National Bank of Commerce Building
New Orleans, Louisiana 70112

New Orleans, Louisiana, May 12, 1976



CARYL H. VESY